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THE SPIRIT OF MISRULE.

The frequency and impunity with which crimes against social order are increasing in the large cities of this Union, are among the most alarming symptoms of the future, which have appeared to perplex and discourage the statesman and the friend of liberty. Mysterious and undetected murders, frantic and uncontrolled riots, open and unpunished arson, tales of horror and excess, such as we can only find parallels for, in looking back age after age, in the great criminal record of history, and which even there seem, from their atrocity, to have been narrated by men who had studied to impart a coloring too gloomy to be real, — all these have become the daily material of our wonder-spreading press, and the accustomed mental food of a community, whose appetite has grown morbidly insatiable of horrors, from the supply which is so unceasingly furnished.

It would be an offensive labor, to spread before our readers the details of the various crimes, accompanied by actual violence, which have degraded and demoralized this country for the last ten or twelve years. Within this period, there has been a manifest and most unfavorable change in the community at large, in three particulars. Crimes attended by violence have increased in frequency. They have more frequently been perpetrated with impunity. They have not been met with that deep strong response of

public indignation, which, in other times, has been one of the severest penalties of guilt. We think, too, that this unfavorable change can be traced to a few nearly simultaneous events, the time of which forms an epoch, since when, crime in its frequency and impunity has grown to the important and appalling stature, with which it now stalks among us.

These events are the destruction of the Ursuline Convent in 1834, and the Vicksburg and other Mississippi dispensations of Lynch law, in 1835. Though no lives were lost in the Convent riot, we are inclined to believe that event to be the most disgraceful crime, that was ever committed in America. It was an act not only of cowardly meanness, but occurring as it did, among a New England population, was a sin against the clearest knowledge, and the best and most sacred influences. Shortly after followed the Vicksburg riot, and another of the same kind in that vicinity, attended with similar murderous excesses. The Vicksburg affair may be classified as the first of a series of notorious outrages, which have since become common in the United States. In this occurrence, a nest of gamblers, whose excesses had excited the deep and just indignation of the community, and against whom, we must admit, that the laws of the country seemed to afford remedies too feeble or too slow, were set upon in a tumultuous manner, by a body of citizens, some of whom were of high respectability. The lives of some of the assailants were lost, and in the hot blood thereby occasioned, the gamblers were summarily executed, and the new code of the Lynch law was formally introduced to the attention of the country.

When this event was first made public, the minds of the people were filled with astonished horror. Even the rough manners and feelings of the south-west, had not taught us to expect such a catastrophe. A new page of the history of national character was opened, and it seemed as if written in an unknown language. Men looked impatiently for the punishment of the offenders. But the grand juries were silent. The torrent of public approbation, in the country where the scene was enacted, was too strong for the laws. We looked for an abatement of this feeling, and for the reaction from it. To a community educated in habitual reverence for law and order, it seemed impossible that such a crime should be perpetrated with impunity, and we thought that the time must surely come, when the arm of the law, however slow, would be sufficiently strengthened by the public support, to reach, and to punish these most respectable citizens, thus guilty of wanton murder. We were disappointed. Mississippi, in her years of calm reflection, has

proved true to the passionate impulses of the moment, and the actors in this great outrage have ever continued to live unmolested, yea honored among their fellows.

We fear that the impunity with which this crime was followed, has impressed a stamp on western character, that will long be uneffaced. It is certain, that the new code was at once brought into repute, and since that era, the hanging and burning of untried, though perhaps guilty men, have been no unusual items in the budgets of south-western news.

If it be ever allowed to entertain sympathy for crime, the proceedings of this wild, rough justice of the west, may authorize and provoke it. For when we hear that gamblers, and sharpers, and kidnappers, and murderers have been hanged and burned without judge or jury, while we feel our indignation stirring within us, at the thought that such deeds are perpetrated in a land calling itself christian, we are also inclined very greatly to question the justness of the accusation, and to suppose that men who have not been tried for their offences, according to the forms of law, were denied a hearing, because calm, legal investigation might show their innocence, and disappoint the thirsty passions of their accusing judges. It is dangerous to trifle with the rights of the guilty. The felon may become a martyr, and the accuser an assassin. Justice must hide her head, when revenge takes the place of retribution.

It is narrated by Tacitus, that the emperor Galba, on a certain occasion, put to death two men who were notoriously guilty, but without any form of trial. Their fate excited sympathy for them, and hatred towards the emperor. The striking remark of the historian is, "*Inauditi atque indefensi, tanquam innocentes perierant.*"

Following these beginnings of evil, in due order, most serious and uncontrollable riots have occurred in Baltimore and Philadelphia. Two or three murders of women by men, and of men by women, have been perpetrated in New York; and in Boston symptoms of the same spirit, though promptly repressed, have at times been manifested.

In this connection is to be observed the remarkable impunity of crime to which we have alluded, — an impunity arising in part from the public indifference, and in part from a pernicious and ill-placed sympathy either with the offender or the offence.

It is somewhere said by Sir Walter Scott, in speaking of an undiscovered murder, that it does not appear to be the will of God that such great crimes should escape unpunished. This saying has been falsified in the United States. We presume that there is nothing parallel in the history of man, to the impunity with which

great crimes have been attended in the United States for ten or twelve years past. We will not dwell upon those secret and undiscovered offences, that seem to baffle the powers of human investigation, though we cannot but attribute the mystery which still veils the murders, which have been perpetrated within a few years in New York, to some radical though remediable defect in the organization of the government. With Sir Walter Scott, we do not believe that such great crimes can remain concealed, when the community and its officers are duly zealous and watchful for their detection. There are a thousand tumultuous feelings in the minds of men who have committed such deeds, that cannot and will not be repressed. There are tones and looks and altered manner, which are continually struggling to betray the great dread secret of the soul, and which must be suggestive to the lookers on of something which is hidden and which ought to be made known. It was an unfortunate discovery, that the crime of murder may not only by possibility be concealed, but that it is very easy of concealment.

The riots which have occurred, beginning with those at the head of our list, sometimes accompanied by murder and sometimes not, have been effected openly. They have been "seen, heard, attested" by thousands of wondering and perhaps applauding spectators, yet we hardly hear of any serious punishment inflicted on those concerned in them. Facts are known, persons are known, offenders are clearly within reach of the laws, and yet the law either does not attempt to strike, or else public opinion or sympathy interpose a shield, before its uplifted sword.

In the case of the Vicksburg riot, we presume any attempt at judicial proceeding would have been fatal to the prosecutor. At the destruction of the Ursuline convent at Charlestown, the rioters were made manifest by the light of the flames of their own raising. They were seen on that night moving like fiends amid the desolation which they rejoiced in creating. They were known, recognized, identified, yet the law was completely baffled, witnesses were found to swear to *alibis*, to anything that would secure the escape of the offenders, and it was well known that the only check to procuring testimony of any description that the defence might need, was the integrity of the counsel, who were called upon to secure to the offenders the protection of those laws which they had outraged.

An event occurred not long since in Pennsylvania, which strikingly illustrates the vitiated state of the public mind with regard to sympathy for crime. We say with crime, because we are willing to admit that no persons are more to be pitied, because none are

more wretched than great criminals. But when this pity is carried to the extent of screening the offender from punishment, a great duty to society is violated, the great bulwarks of social order are overthrown.

The event referred to was this. A man by the name of Heberton had, under very aggravated circumstances, seduced a young girl, a Miss Mercer, whose brother upon learning the fact, after several days of reflection and preparation, lay in wait for Heberton, and shot him down without any opportunity for defence, or preparation for death. Mercer was tried for the murder, and acquitted on the plea of insanity, a plea which the public did not believe to be true. We hesitate not to say, if as we believe this plea was not true, though the result of the trial was generally satisfactory, that Mercer ought to have been convicted. We do not seek to palliate Heberton's offence. It is one which is far too lightly dealt with in our penal systems. It is one which we consider, in its atrocity and the depravation of character which it exhibits, as only second to that of murder. We cannot but think that the acquittal of Mercer must be ascribed to the general opinion, that the act which he committed was justified, or at least excused, by the provocation. Never was opinion more erroneous.

There has been implanted in our hearts the principle that crime must be followed by retribution. When this principle is violated we remain restless and dissatisfied, and there is nothing short of the fulfilment of this condition of human nature, that will soothe that nature to tranquillity. This is a pure and righteous feeling. It is one of the chief motives by which human governments can be made effective, and it appears to be a part of the system, by which the divine government of man is carried on. We are inclined to agree with the opinion expressed by Plato in the Gorgias, that punishment is better even for the offender, than impunity.

But this principle of retribution is by no means to be confounded with the promptings of revenge. In a civilized community, while every one has a right to redress for injury, no man can possibly have a right to revenge. There is no such right. Whoever attempts to substitute the workings of his own quick will, for the slow and deliberate process of legal justice, is guilty of a crime against society, and society, in countenancing such an offender, is untrue to the conditions of its own existence. If a man, in consequence of any provocation whatever, deliberately and purposely takes the life of another, and on trial is acquitted on the ground of the provocation, there is an explicit recognition of the principle, that there may be causes that will justify private revenge, or that will justify

murder. The time has been when such a course of argument has been seriously urged. The strongest point in Cicero's defence of Milo was, that Clodius was a bad and dangerous man, and consequently that his assassination, so far from being a crime, was a public benefit and a meritorious act. The public approval of the verdict in Mercer's case, was nothing else than the recognition of such an argument. It was to prevent such a state of things that laws were instituted. No doubt there is a natural and decorous sympathy for an offender in a case like this. But it is a condition of our well-being that we must frequently do violence to the promptings of the heart. The laws of nature in the material world yield not for the sake of particular instances, and if a different course is allowed to sway the government of our moral feelings, if general and well established rules are made to yield to what with mistaken sensibility are called "hard cases," there is an end to all security and repose.[1]

The laws are strong enough to resist, and quick enough to punish crime in its open and unpalliated excesses. It is only the insidious and plausible gloss of virtue, which can lull their vigilance or baffle their power. We believe that the escape of offenders on the ground of provocation, does more to vitiate the public morals and undermine the stability of our criminal jurisprudence, than would the impunity of criminals who have no such specious excuse to plead, for the exercise of their sordid and brutal impulses. Lord Bacon, alluding to the Mosaic law, says, "In the law of leprosy where it is said 'if the whiteness overspread the flesh, the patient may pass abroad for clean, but if there be any whole flesh remaining, he is to be shut up for unclean,' there is noted a position of moral philosophy, that men abandoned to vice

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[1] Sir Walter Scott has well illustrated this idea in the following passage in his tale of the Two Drovers. "The first object of civilization is to place the general protection of the law equally administered, in the room of that wild justice which every man cut and carved for himself, according to the length of his sword, and the strength of his arm. The law says to the subjects, with a voice only inferior to that of the Deity, 'Vengeance is mine.' The instant that there is time for passion to cool and reason to interpose, an injured party must become aware that the law assumes the exclusive cognizance of the right and wrong betwixt the parties, and opposes her inviolable buckler to every attempt of the injured party to right himself. I repeat that this unhappy man ought personally to be the object rather of our pity than our abhorrence, for he failed in his ignorance and from mistaken notions of honor. But his crime is not the less that of murder. Should this man's action remain unpunished, you may unsheath, under various pretences, a thousand daggers betwixt the Landsend and the Orkneys."

do not so much corrupt manners, as those that are half good and half evil."

The recent murder of the Mormon leaders is but another step in the path to which the principles we have been examining will lead. Joe Smith was, no doubt, a nuisance to the region in which he lived. But what a mode of abating a nuisance! To shoot men who had surrendered themselves to the custody of the law, and submitted to its judgments, under a guaranty, on the part of the highest authority of the government, that they should be safe from all *illegal* violence! But we may safely predict that no capital, nay, no serious punishment will be inflicted upon the perpetrators of this "murder under trust." We doubt if any judicial inquiry even will be had in the premises. The people of the West, glad to be rid of the incubus that has so long annoyed them, will pass lightly on their means of deliverance, and will content themselves with a judgment on the prophet's fate, similar to that which Suetonius has recorded as the opinion of antiquity on the death of the great dictator, "*abusus dominatione et jure cæsus.*[1]"

The late riots in Philadelphia are a part of the bitter fruits of the impunity which has attended crime in the United States, and of which we have attempted to assign the causes. This matter of riots in the large cities is becoming serious. The places in which the passions of the lowest populace have been allowed to burst out with the least check, have hitherto been Philadelphia and Baltimore. In these cities there appears to be absolutely a want of that instinctive energy, upon the part of the municipal authorities, which should watch and restrain the beginnings of evil. It has become apparent, that these mobs may be aroused and proceed to a certain point with safety. Prevention appears not to be thought of, and it follows certainly where such is the case, that the mob spirit will begin to show itself. There is always existing, in a large population, a certain proportion of desperate and lawless characters, who are only to be restrained by the fears of consequences, who will be always ready, on any pretext, to carry insubordination to that

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[1] It is not out of place to transcribe the remarks made by this writer upon the fate of the assassins of Cæsar, as showing the sentiment even of pagan civilization, that retributive justice pursues and overtakes the perpetrators of such specious crimes. "*Percussorum autem fere neque triennio quisquam amplius supervixit, neque sua morte defunctus est. Damnati omnes, alius alio casu periit; pars naufragio, pars prælio: nonnulli semet eodem illo pugione, quo Cæsarem violaverant, interemerunt.*"

point, where it may be indulged with safety. If this limit is placed so far off from that tranquillity necessary for the preservation of order, that the evil passions may safely be excited to action, then of course, the remedial power of restraint becomes much more difficult, than would have been the preventive power, if promptly exercised at the first symptoms of disturbance.

In the Philadelphia riots, the immediate pretexts were but as sparks applied to the explosive materials already accumulated in this ill-governed and devoted city. It is useless to attempt to investigate the right or the wrong on a subject which is all covered with the blackness of such dreadful gloom, or to talk of causes and provocations where no causes and no provocations were sufficient to produce such fatal results.

Riots, like those in Philadelphia, form a strange subject for contemplation. Such commotions have generally an object, either real or fanciful. There is some withheld good to be obtained. There is some existing evil to be remedied. The war of the Jacquerie was a revolt against intolerable oppression. The London riots of 1780 were prompted by fears for the safety of the church. The French revolution was a movement to reform the state. But against what were the Philadelphia rioters striving? There had been no encroachment, no innovation. Affairs were flowing in the even course they had held for seventy years. There were differences of opinion. Foreigners and natives were jealous of each other; but there was no grievance which might not have been adjusted in twenty-four hours time, by a constable and a police magistrate. If the people were rebelling against government, they were rebelling against themselves, for we have never heard any complaint that the institutions of Pennsylvania were not sufficiently democratic. And yet that they were not so, is the source of the whole trouble. A new principle of government has been practically advanced in America. It is to be found in no treatises or codes, but has been brought forward, as we have said, practically, by explosions of popular feeling amounting to insurrection and civil war. It consists in a new mode of exercising the right of the majority of the people to direct the government. Its upholders declare, at the mouth of the cannon, and by the light of the incendiary torch, that the ancient and established modes of political action have become obsolete. The first practical lesson in this new system has been given in Rhode Island. The teacher is reaping the deserved fruit of his instructions. Upon this lesson the Philadelphia mob has improved. The Rhode Island insurgents

had an object. It is true, they were informed that the substantial point in dispute could be obtained in a constitutional manner, whenever they chose so to accept it. But they preferred obtaining their end by bloodshed and anarchy. They desired liberty, but liberty under the protection of law had no charms for them. In Philadelphia it is difficult to see what the rioters would be at. They appear to be burning and murdering for the mere love of it. Strange to say, a sympathy with the mob has manifested itself, even among the respectable classes.

During and after the riots in May we heard strong animadversions upon the backwardness of the military. We joined in this censure. We wondered that men, having arms in their hands, having an effective military organization, and the power and opportunity under the sanction of the law to maintain the peace, should still have held back their hands. But this is explained, when we find that they could not obtain permission or orders to act efficiently. They might be parade soldiers with arms and uniforms, but they must not fire. Whoever has seen one of our military shows must be aware, that the citizen, as soon as he puts on his uniform, and shoulders his musket, becomes one of the most helpless of beings. He may manœuvre and march for the delectation of the crowd, but woe to him if in that guise he attempt to repress the encroachments of the lookers on. This may be all very well in tranquil times. But that men in times of riot should be called out, in a conspicuous dress, and organization, to face and repel the wild passions of a mob, that knows that the muskets and bayonets have no more force than so many broomsticks, is too much for human nature to bear, and we respect the military corps of Philadelphia, that they were backward in submitting to such conditions.

At the rekindling of the fires of discord in July, it was at length found necessary to make some further use of the military, than to set them up as marks for the missiles of the rabble. They showed the utmost promptness and bravery in discharging their duty, while at the same time they did not resort to the last appeal, until all other measures had failed, and they saw their officers about to become victims to the rioters. And now we are told in some quarters, that public opinion is against the military. Before they were censured for too much coldness, and now for too much heat. We trust that the only exponent of such public opinion, is the press which represents and incites the rioters. We cannot think that any right-minded man regrets a single drop of blood which

has been shed in these riots, except that which was drawn from the gallant military defenders of the law.

If we mistake not the signs of the times, the people of this Union are destined bitterly to regret the disrepute, into which the militia is falling. None of the cities in the northern and middle states have a strong police, or any other organized force except the militia, which can be relied on at need. Yet this force decays daily, at a time when it should be cherished with the utmost care. We are forgetting the teachings of Washington. The two most serious insurrections which have ever occurred in the United States, have been quelled by the militia. We refer to Shays's rebellion and the whisky insurrection of Pennsylvania. Yet hardly a session of the state legislature is held, without a movement being made adverse to this most important branch of our defence. To speak of danger from a civic militia is absurd. The objection of expense is fit only for the mouths of the lowest demagogues, who find the cry of retrenchment a convenient means to bring down our institutions, to the level of their estimate of the people.

The strange expectation which seems of late to have assumed the consistency of a systematic theory, that the blessings of good government and the safeguards of public order are to be obtained without our being willing to pay any price or make any sacrifice to secure them, has not been without its effect on the militia. There is no compensation provided in Pennsylvania for the militia while in active service, though the subject has been brought before the legislature. Consequently the young men in the busy pursuits of life, of whom it must of necessity be composed, feel that every day passed in the thankless duty of guarding the public safety, is so much time absolutely lost to themselves. It is a loss which such men, with the world before them, and generally with no resource but their own industry, must be unable to bear. Nor is it creditable to any state, that she should be thus unwilling to meet the expenses of the common security. Such a state will have little cause of just complaint, if she realize the fable of the sheep who rejected the guardianship of the dog, at the instigation of the wolf. What can be expected of the future of a people, who are thus blind to all high views of their own true interests? Can it be supposed that the blessings of our republic can be long preserved, unless something like a spirit of self-sacrifice for the public good actuates the hearts of the people? Is it to be expected, that the great destinies of our country can be realized, and its great hopes fulfilled, by men who are not warmed by impulses which reach farther than mere

private results? If we ever expect to become a great or a happy people, we must feel that we have a country, and that to her is due a reverential self-devotion, greater even than that, which divine and human laws teach us to render to our natural parents. On an ancient English battle field has been found a piece of rusting armour, with the inscription, "*En loyal amour tout mon cœur.*" It is precisely the sentiment which is most wanting in the American character. Without it we shall never rival the career of those, whose blood is in our veins, and who though dead yet speak to us, in the monumental greatness of their renown.

It is very apparent that society cannot long continue to exist under the conditions to which the mob spirit subjects it. Security and tranquillity are the elements, not only of social happiness, but of social existence. The interests that are bound up in the enjoyment of life and property are sensitive, and shrink before if they cannot resist the shocks of anarchy. But society will continue to exist. There is no instance that we know of in history, where the disorganizing principle has finally triumphed over social institutions. The power of the former is like the convulsive and self-destroying forces that precede dissolution, that of the latter is a sound and life-like vigor, that is ever gaining strength. In America particularly it is far the most active principle. There is a springing and fiery energy in the millions who are crowding our thoroughfares of life, each with the right to hope and by consequence with the spirit to dare, that must in some way prove too strong for any adverse influences. More especially does the tide of life pour towards our great cities, and more particularly necessary is it, that in them the conservative principle should be sure. That very necessity will produce its own realization. The minds of men are not yet sufficiently aroused on this subject, which is proved by the fact that the bad symptoms have not yet arrived at the worst. Each new outrage is of greater atrocity than that which preceded it; a sure sign that affairs have not yet arrived at that critical worst point, after which they will be sure to mend.

It is very certain, that in the municipal organization of the city of Boston there is not provided any more effective preventive force, than in the other cities of the Union. We question whether we have a police as strong in proportion, either in numbers or authority, as those of New York and Philadelphia. Yet the public peace is more effectually preserved here than in either of those cities. We explain this by saying, that in this matter of public order, the people are a law unto themselves. With an entire conviction of the necessity of government, they object to the expense and re-

strictions of any but self-government. Accordingly we have a system not recognized by any written laws, but written upon the understanding, which makes every man a conservator of the peace, and which, while our social condition remains as it now is, renders the probability of any serious disturbance very remote. It is a system which substitutes the early training of the school-room, for the tardy coercion of the grand jury and the jail.

Unless such training can be made as effectual in the other cities of the Union, it follows that the same results must be effected by other means. At present there is a want of such training or of any substitute for it. The only other method which we can think of is, giving an increased and disproportionate power to the civil authority, by making a government strong enough to overawe those, who cannot govern themselves. It has long appeared to us, that the tendency of events in our large cities has been such as must result in the creation of such a strong coercive power, as is not yet known among us, and which has heretofore been looked upon as foreign to the spirit of our institutions. It is to be hoped, that the indications and the necessity of such a change will be confined to our three largest cities, but it is through them, if ever, that the American people are to learn, what a strong government is, and to be familiarized to the aspect and use of a power stronger, more arbitrary and less under popular control, than any which our happy circumstances have yet brought any part of our land in subjection to.

Police regulation has been carried almost to perfection in Europe. We never hear of a riot in Vienna or in the Russian capitals. Not often in Paris, unless it is exalted to the dignity of a revolution. London has long enjoyed perfect tranquillity. If there were no other cause to make the name of Sir Robert Peel memorable, the great blessing which he has bestowed upon his country, in carrying through the system of the new police, would of itself entitle him to a high place among the benefactors of mankind. In London, the police is a civic army, in numbers and discipline worthy of the name. Without any of the insignia of military show, but distinguishable by a known and conspicuous badge, the police is to be found at every turning. With more than the eyes of Argus, or the arms of Briareus, untiring in vigilance, and irresistible in power, it is omnipresent, ever ready to detect and suppress the beginnings of evil. It is eminently a humane system. It is preventive and conciliatory. It seeks to soothe and reclaim, by the most persuasive and gentle influences, instead of irritating by tyranny and harshness, the misery, which in a place like London,

must be working at the heart-strings of so many of its thousands of unfortunates. But under this exhibition of forbearing gentleness, there watches an almost irresistible power, the power of law, of numbers, of union, of systematic and scientific organization. When the gentler remedies have failed, this power is called into instant and efficient action. There is no force which the dangerous classes can command, that would resist it for a moment. The consequence is, the streets of London are safe and peaceful. The defenceless have always a protector within the call of their voices. The bewildered wanderer has but to ask and find his direction. The child who has lost its protector, or the parent who has lost his child in the crowd, is each almost certain of finding the other at their common home. The robber, the thief, the ruffian shrink into darkness. A riot in London would, we presume, be almost impossible. The streets of London are more safe for the defenceless and the weak, than are those of most American towns of any considerable magnitude.

But this system has its price, a price which would be unwillingly paid by any people not inured by habit to excessive burdens of taxation. It has its price, too, in the restraints which it imposes, and which would be even more onerous than taxation to a people accustomed to the unrestrained freedom of the United States. But to such a system, with all its onerous burdens and its despotic powers, must our large cities be driven, if there is not a moral perception of the advantages of order, clear and strong enough of itself to preserve tranquillity. It is idle to say, that any approach to a more arbitrary authority, than is now to be found in our democratic constitutions, is adverse to our vested franchises. No political institutions are in accordance with the circumstances of any nation, unless they accomplish their object of preserving security and domestic peace. These are the primal conditions of social existence. The forms of free government are forms only, unless they are supported by a principle within the hearts of the people, and unless so supported they will surely fall, and be replaced by something that will satisfy the demands of society. That something, whether it be a written constitution, a moral sense, a strong police, or a standing army, is the very institution which is suited to the genius of the people; and any institution which does not fulfil these conditions is unsuitable, and must soon or late die away and be forgotten.

Recent American Decisions.

District Court of the United States, Massachusetts, July, 1844, at Boston. In Admiralty.

The Brig Cynosure.

When two vessels approach each other on opposite tacks, each being close-hauled, and it is doubtful which is to windward, the vessel on the starboard tack should keep on her course, and the vessel on the larboard tack should keep off.

Where, in such a case, from the evidence and the opinion of experts, it appeared that the Cynosure, the vessel on the larboard tack, should have seen the light of the Androdus, the vessel on the starboard tack, and have drawn an inference from the bearing of her light respecting her situation, in season to clear her by keeping off, and the Androdus kept on, but the Cynosure, by not keeping off, occasioned a collision; it was held, that the Cynosure was liable for the damages.

This was a libel in a case of collision, in which S. G. Nicoll was the libellant, and W. McClure the respondent. The principles upon which this case was decided were chiefly of a nautical character, but may be found important in many cases of collision; and in guiding masters and officers in the management of vessels which are approaching each other at sea.

The hermaphrodite brig Androdus, of New York, owned by Mr. Nicoll, was on a passage from Rochelle to New York, and on the night of the collision was sailing close-hauled upon the starboard tack, the wind being about north, and the vessel heading W. N. W. The Cynosure was bound from Surinam to Boston, and was close-hauled on the larboard tack, heading about E. N. E. The time of the collision was about three o'clock in the morning, the night clear, with starlight, but no moon, and a moderate breeze. It appeared from the testimony on both sides that the Androdus kept her course, hailing the other vessel to bear away, until a collision became inevitable, when she put her helm down and came into the wind; and that the Cynosure also kept her course until a minute before the contact, when she also put her helm down, came into the wind, and struck the Androdus on the lee side, her jib-boom running over the Androdus's lee rail, between the fore and main rigging.

The libellant's claim for damages was put upon the ground that the Cynosure, being on the larboard tack, should have kept off, by

the law of the ocean; and that, moreover, being the leeward-most (as appeared from the manner in which she struck the Androdus) she would have gone clear of her, under her stern, had she not luffed. On the part of the defence, it was admitted that no blame was to be attached to the Androdus, but it was contended that the Cynosure did the best she could under the circumstances, and that the collision was one of those inevitable accidents, consequent upon the uncertainties of winds, weather, and the darkness of night, which must be borne by the parties upon whom they fall.

The evidence on the part of the libellant was that the Cynosure was discovered at some distance; that a light was hung out on the Androdus's lee quarter; that when the Cynosure was found to be keeping her course, she was hailed several times through a trumpet to keep off, and put her helm up; that she kept on her course until within a few yards of the Androdus, when she luffed and struck the Androdus in the manner described.

On the part of the defence, the chief mate of the Cynosure testified that the light of the Androdus was seen twelve or fifteen minutes before the collision; that he could not see the vessel, nor make out which way she was standing; that before he could make out which way she was standing, a collision became inevitable, and he ordered the helm down, to bring the vessel into the wind and diminish the force of the shock. The man at the wheel testified substantially in the same manner, except that he made the time between the discovery of the light and the collision considerably less. The only other witness who was on deck before the Cynosure luffed, said that he saw the light, called out "light ho!" that the mate came forward, looked over the bow, and gave the order to put the helm down; that he could not see the Androdus distinctly, so as to make out her course, until she was within a few lengths of them; and that there was not more than two minutes between the time of seeing the light and the collision.

The Cynosure is a vessel of about three hundred and fifty tons, and had topgallant sails set. The Androdus is a hermaphrodite brig of about one hundred and forty tons, and had nothing above her foretopmast, having lost her topgallant mast a few days before.

On this evidence it was contended, that when the Androdus was first seen by the Cynosure a collision was inevitable, and it was too late to do anything else than come up into the wind and diminish the force of the shock.

In the case of *Lowry* v. *The Steamboat Portland*, (1 Law Rep. 313,) Benjamin Rich, William Sturgis and Francis Dewson, gave their opinions upon several nautical questions, one of which was

relied upon in this cause, and was to this effect. When two vessels are approaching each other on opposite tacks, each sailing on the wind, and it is doubtful which is to windward, the vessel to the larboard tack should give way, and thus each pass to the right. And these gentlemen added to their opinion, — "These rules are particularly intended to govern vessels approaching each other under circumstances that prevent their course and movements being readily ascertained with accuracy, for instance, in a dark night or dense fog."

In this case the following gentlemen were examined as experts: Benjamin Rich, James W. Sever and Edward H. Faucon, whose opinions upon the general principles governing such cases were substantially as follows:

The rule of the ocean is, that when two vessels approach each other on opposite tacks, each being on a wind, the vessel on the starboard tack keeps on, and the vessel on the larboard tack keeps off. Even if the latter is the weather-most, she attempts to go to windward of the other, at her peril. She may go about and stand off on the other tack, but she must do this in season, at her peril.

When two vessels approach each other on opposite tacks, each bears on the lee bow of the other. If you are on the larboard tack, and see a light bearing a few points on your lee bow, if there is a tolerable breeze, the course of the other vessel can be determined immediately, without seeing the vessel itself, by the change in the bearing of the light. For if the other vessel is going free, the light will change its bearing instantly and rapidly by passing astern. If the light is from a stationary object, you will leave it astern, though less rapidly. If the light does not change its bearings, and approaches you, it must be from a vessel sailing by the wind on the other tack. In such case, the duty of the vessel on the larboard tack is to keep off, at once. Being cross-examined as to whether the vessel on the larboard tack ought to keep off if the light bore as large as four points on the bow, the witnesses said that four points would be wide for a vessel to come in contact, but that they should feel bound to keep off even in that case, for it is not easy to ascertain the exact number of points without a compass, and because the coming to and falling off of vessels sailing by the wind in a moderate breeze, often varies the apparent bearings a little.

Since the vessel on the starboard tack has a right to keep on, if she finds at last that a collision is inevitable, she has only to come into the wind. So, the vessel on the larboard tack, if she does not discover the other vessel until a collision is inevitable, may come

into the wind; but this would only be when she was so much to windward that she could not clear the other vessel by keeping off. If the vessel on the larboard tack luffs before she strikes the other, and yet after coming into the wind strikes her on the lee side nearly amidships, we should say that if she had not luffed she would have gone clear, passing under the stern. Certainly she would, by keeping off a point.

After a hearing, the court desired further information upon certain points, and it was agreed that the evidence should be submitted to two experts, who should answer questions propounded by the court upon those points. The gentlemen agreed upon were Messrs. Benjamin Rich and William Sturgis. Subsequently Mr. John S. Sleeper was substituted for Mr. Sturgis, who was ill. Their answers were as follows: —

To question the first. "It appears that when the Androdus was first seen from the Cynosure, she was on the lee bow, the most unfavorable position for discovering a light or other object. It is usual on board vessels at sea, when sailing on a wind, to keep a sharp look-out to windward and ahead, but little danger being apprehended from vessels coming up under the lee. Therefore, allowing as vigilant a look-out to have been kept on board the Cynosure as is customary at sea, the light on board the Androdus, unless it was a very bright one, might not have been seen until the vessels were within a quarter of a mile of each other, without rendering the watch on deck liable to the charge of neglecting their duty."

To question the second, they answered, that not more than one minute would be necessary to determine that the Androdus was steering close-hauled on the starboard tack. This was predicated upon the fact that the Androdus was coming at such an angle that a considerable portion of her broadside could be seen, and upon the facts as to the bearings of the light, as testified to by the other gentlemen.

To question the third. "This question supposes the vessels to be approaching each other on opposite tacks, and the Androdus to be crossing the bow of the Cynosure, having clearly passed one-third of her length across the bow of that vessel. The Cynosure would then be heading for the after part of the fore chains of the Androdus, in a diagonal direction. If the vessels were in this position when only a few lengths from each other, it is plain that the only way to prevent a concussion on the part of the Cynosure would be to put the helm *hard up*. If the Cynosure would answer her helm, she would rapidly fall off, and the vessels come side by

side, in parallel directions, heading opposite ways, and might come in contact, rubbing past each other without sustaining much injury. If, when in the position first stated, and the vessels within a few lengths of each other, the helm of the Cynosure should be put down, it would exhibit a deficiency of nautical skill or presence of mind, as in that case the vessels would inevitably come in dangerous contact. If the vessels, at the time, were a quarter of a mile apart, or perhaps even less, and the Cynosure would work quick without ranging ahead greatly in stays, she might have gone about without coming in contact with the Androdus; but even then, it would have been, with plenty of sea-room, more safe and consequently advisable, to have put the helm up and shivered the after yards."

R. H. Dana, jr., for the libellant.
F. C. Loring, for the respondent.

The Court said that upon the evidence in the case, it was satisfied that each vessel was sailing by the wind, the Androdus on the starboard and the Cynosure on the larboard tack; that the Androdus showed a light, kept her course, and when a collision was inevitable, luffed into the wind. No blame was attributable to her. It would seem that the Cynosure either did see or ought to have seen the light of the Androdus in sufficient season to keep off. From the opinions of the nautical gentlemen, it would seem that the Androdus was from one third to one half her length to windward of the Cynosure, and could have cleared her by keeping off a little; perhaps, by simply keeping her course without luffing. His Honor thought it proved that the Cynosure ought to have known the course and movements of the Androdus, either by seeing the vessel, or by inferences which, as all the experts say, nautical men would draw at once from the bearing of the light.

Decree for the libellant, for damages and costs.

The Cynosure.

The statute of Louisiana, 1842, No. 123, imposing a penalty upon any colored person who comes within the state, on board of any vessel, is unconstitutional.

A master of a vessel, who pays the fees and expenses, occasioned by the arrest and detention of a colored seaman, under the said statute, cannot deduct the amount from the seaman's wages.

The seaman is not entitled to extra compensation from the master, on account of such imprisonment.

This was a libel for seaman's wages, in which Martin was libellant,

and McClure respondent. The amount of wages was adjusted between the counsel, with the agreement that one item should be left to the decision of the court; the point being a rebate, arising under a recent statute of Louisiana.

The libellant, who was cook of the Cynosure, was a colored man, and while at New Orleans was taken from the vessel by the authorities of the place, detained in prison during the stay of the vessel, and delivered up to the master when the vessel sailed. The imprisonment of the libellant was under the act of Louisiana, 1842, No. 123; from which we extract the passages bearing upon the case.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, that from and after the time specified in this act, no free negro, mulatto or person of color shall come into this state on board of any vessel or steamboat, as a cook, steward, mariner, or in any employment on board that vessel or steamboat, or as a passenger; and in case any vessel or steamboat shall arrive in any port or harbor or landing on any river in this state, from any other state or foreign port, having on board any free negro, mulatto or person of color, the harbor master or other person having charge of such port shall forthwith notify, &c. . . . Whereupon the judge shall immediately issue a warrant to apprehend and bring every such free negro, mulatto or colored person before him, and shall forthwith commit him or her to the parish jail, there to be confined until such vessel or steamboat is ready to proceed to sea, when the master of such vessel or steamboat shall, by the written order of the judge, take and carry away out of this state every such free negro, mulatto or person of color, and pay the expenses of his or her apprehension and detention.

Section 2, requires the master of every vessel having such free negro on board, to give bond with sureties, in $500 for each negro, to pay the expenses of his arrest and detention, and imposes a penalty of $1000 upon the master and owner, if this bond is not given within three days after the vessel's arrival.

Section 3, provides that if the master neglect or refuse to take away such negro in his vessel, the negro shall be sent out of the limits of the state by the sheriff, the expense of which transportation shall be borne by the negro if he has the means of payment, if not, then at the expense of the state, to be paid out of the penalty recoverable of the master or owner under this act.

Section 4, imposes a punishment of 5 years' imprisonment upon any negro, &c. who shall return to the state after having been imprisoned and transported as above.

Section 11, requires every master of a vessel coming from another state or from a foreign port, to make a report, under oath, of the name, age and occupation of every free negro, &c. on board his vessel, within twenty-six hours after his arrival, under a penalty of $100 for each omission.

The master paid the fees attendant upon the arrest and detention of the libellant, and his board while in jail. He allowed him wages for all that time, but reserved the question whether the ship was also to bear the jail fees and expenses above named, or whether they were a personal charge upon the seaman.

R. H. Dana, jr., for the libellant.

A. H. Fiske, for the respondent.

The Court remarked, that the statute inflicts imprisonment upon the colored person who comes within the state, under these circumstances; but the payment of the charges seems to be placed as a deterring tax or penalty upon the vessel or master, as he and his bondsman are made responsible for them. It is argued that the tax and imprisonment are unconstitutional. The court thought it clear that they were so. A certain color is made the sole test, by which a citizen of either state is forbidden to enter Louisiana, under penalty of imprisonment. Why may not a different color than black be made the criterion? Why may not any other personal mark? Indeed, the professing a certain creed, religious or political, might be made a ground of exclusion. This statute seems to be clearly in contravention of the provision of the constitution, with reference to the rights of citizens in other states. Yet this will not change the liability of the master; for if he has paid an unconstitutional tax, without either an express or implied request from the seaman, the burden must be borne by the party who first assumed it.

The shipping articles did not specify a voyage to New Orleans, but to Apalachicola and other ports. It is suggested that the libellant may be entitled to extra compensation for the imprisonment he suffered, since the contract gave no notice that he would be required to go to New Orleans. But the contract, it is admitted, would give the master a right to take the libellant to New Orleans, after going to Apalachicola, under ordinary circumstances; and the court thought he could not be held to have contemplated that the libellant would suffer an unconstitutional imprisonment.

Supreme Judicial Court of Massachusetts, March Term, held by adjournment in June, 1844, at Boston.

PROPRIETORS OF HOLLIS STREET MEETING HOUSE *v.* JOHN PIERPONT.

Where a church and pastor submit a question to an ecclesiastical council, the decision of the council thereon is conclusive, as to the facts submitted to them.

Where a bill in equity is brought for a discovery, to be used in a trial at law, the court will inquire into the admissibility and effect of the evidence sought, in the court of law.

Whether a pastor can be compelled, upon a bill of discovery, to disclose facts which might work a forfeiture of his office — *quære.*

THIS was a bill for discovery, to be used in the trial of a suit at law, brought by the present defendant against the complainants, for the recovery of his salary as pastor. The object of the bill was to compel the defendant to disclose the authorship of a certain poem, which, several years since, when a prize was offered for the best theatrical prologue, was sent to the prize committee, signed "J. Jamieson;" and also to disclose whether he had not afterwards falsely denied the authorship, under the following circumstances. At the time the prize was offered, a gentleman who had been previously asked by Mr. Pierpont, if he might be relied upon as a confidential friend, in case a poem should be offered, but was not informed directly as to the authorship of the poem, received a letter, believed to be in Mr. Pierpont's handwriting, dated Hartford, and signed J. Jamieson, informing him that a poem with this signature had been sent to the committee, and requesting him, should the poem be successful, to receive the prize money, and pay it to whom he supposed it to belong; and this gentleman subsequently received the prize money, and paid it to Mr. Pierpont. Afterwards, when some excitement arose in regard to the authorship of the poem, and the committee, to relieve themselves from the attacks and imputations cast upon them through the press, were anxious to discover and declare the author's name, Mr. Pierpont replied to an inquiry put to him for this purpose by one of the committee, "that he had not written two lines of heroic verse for two years." The bill charged that Mr. Pierpont was the author of the poem, and that it was written in heroic verse, and within two years. To the complainants' bill a plea was filed, setting forth that the charges contained in the bill had been submitted to a mutual ecclesiastical council, who had fully acquitted him, and that the decision of the

council was binding upon the parties, and could not be re-examined before any other tribunal.

Franklin Dexter and *B. R. Curtis*, for the plaintiffs.
Richard Fletcher and *S. E. Sewall*, for the defendant.

Wilde J. delivered the opinion of the court. The general principle is well settled, that when matters are submitted to an ecclesiastical council, their decision thereon is conclusive upon the parties. When the council give their advice, upon points not submitted to them, such advice carries with it no authority. But if their decision is binding, when it advises that the connection between a congregation and their pastor should be dissolved, it is equally so when it advises that it be not dissolved. The decision of the council may be impeached for partiality in its members, or for other causes, which would be sufficient for setting aside an award, such as, if the reasons assigned for the decision are insufficient to justify the result. But as to the facts found, the decision is conclusive upon the parties. Were it not so, and were their decisions considered as merely advisory, these respectable tribunals, which have been found so useful, and of so much assistance to the cause of justice, would become useless, and would soon cease to be held. If, upon such immoral conduct of the pastor as would subject him to a forfeiture of his office, a vote of dismissal is regularly passed by the congregation, the connection may then be dissolved, upon establishing the charges on a trial by jury. Immoralities of a minor order must be submitted to an ecclesiastical council, and only the grosser immoralities are the proper foundation for a vote of dismissal. But the parties, in either case, may submit the charges to an ecclesiastical council. If, instead of proceeding by vote, and claiming a trial by jury, in a case of gross immorality, they choose to refer the matter to a mutual council, selected with care, there is no reason why the decision of such a council thereon should be re-examined by any other tribunal. The decision of the council is final; — not operating however, as a judgment, *proprio vigore*, nor as an award precisely; — but it is decisive of the facts, so far as they are submitted to them.

A question was raised, whether, in case of a doubt as to the effect, in the suit at law, of the evidence to be obtained by a bill of discovery, the court should allow the discovery prayed for, and leave the court at law to decide upon its effect. Such is the practice in England, but the organization of the courts there is very different from ours. The evidence there is to be used in an entirely different court from the court granting the prayer of the bill of discovery.

But in the present case, the question as to the admissibility and effect of the evidence sought for, is ultimately to be decided in this court. And it will be a saving of time and expense, to decide it before granting the prayer for discovery. Besides, the defendant is called upon to disclose facts which might materially affect his moral character, and he should not be compelled to do it, except in a case where the right to such evidence is manifest. Whether he could be compelled to make a disclosure, which might work a forfeiture of his office, is a question we are not now called upon to decide. In a case of doubt, therefore, we think the court should pass upon the effect of the evidence before granting the prayer for a discovery: and as we consider that the evidence sought for by the present bill would not be admissible on the trial of the suit at law, the bill must be dismissed.

FRANCIS B. CROWNINSHIELD, ASSIGNEE, *v.* THEODORE KITTREDGE.

Where a debtor made a fraudulent conveyance to another person, who sold the property and paid the proceeds to a bona fide creditor, the latter being no party to the fraud, the fraud is purged by the payment, and the party is not liable to the assignee in insolvency of the debtor, in an action to recover the value of the property.

THIS was an action of assumpsit, brought by the plaintiff, as assignee, under the insolvent law of Massachusetts, of William W. Shaw, to recover the value of certain household furniture, mortgaged by Shaw to the defendant, Sept. 14, 1839. It appeared that Shaw applied for the benefit of the insolvent law, on the 12th of October, in the same year. The property was sold by the defendant at auction for $391 80. The condition of the mortgage was to secure a note of $600, given by Shaw to Kittredge; but a receipt for the note was produced, signed by Kittredge, stating it to be given in consideration of Kittredge's giving his own note to Mrs. Maria Pickering, to secure her for a note holden against Shaw. There was no evidence that Kittredge ever gave his note to Mrs. Pickering, but it was shown that she held Shaw's note at the time for $400. It was in contest between the parties, whether, at the time the mortgage was made, Shaw intended to take the benefit of the Insolvent Act. There was evidence tending to show that the mortgage was made for $600, instead of $400, partly in order that the amount might deter Shaw's creditors from attaching; but

Mrs. Pickering was no party to this arrangement, and had no knowledge of it. After notice that the conveyance had been made, she assented to it, and received the proceeds, which were paid to her by the defendant. The payment was made prior to Shaw's application in insolvency. The defendant moved the judge to instruct the jury, that, if they believed this evidence, the plaintiff was not entitled to recover. But the court refused, and instructed the jury, that if one of the purposes of Shaw and Kittredge in making the mortgage for $600 instead of $400, was to hinder and deter Shaw's creditors from attaching, the mortgage was fraudulent and void as against the plaintiff, notwithstanding another and the principal object of the parties was to secure a just debt to Mrs. Pickering; and that the payment of the proceeds to Mrs. Pickering did not discharge the defendant from his liability. The jury found a verdict for the plaintiff, and the defendant filed exceptions to the foregoing instructions.

S. Bartlett and *F. B. Crowninshield*, for the plaintiff.
C. A. Welch, for the defendant.

Hubbard J. delivered the opinion of the court. The conveyance to the defendant, although fraudulent, was not absolutely void, but voidable by bona fide creditors. If the defendant had kept the property in his own hands, he would have been responsible for the amount. But the sale, and the payment of the proceeds to an innocent creditor, purged the transaction of the fraud. If Mrs. Pickering had been a party to the fraudulent transaction, she would have been affected by it. But she was no party thereto, and was herself a bona fide creditor. The defendant had no proceeds in his hands at the commencement of the suit. The payment to a bona fide creditor had discharged his liability. The verdict is to be set aside, and a new trial had at the bar of this court.

Nathaniel Stevens, Assignee, *v.* Jairus B. Lincoln.

While a debt, including usurious and legal demands, remains unpaid, the law will first apply any payments which may be made to the valid demands.

A payment of a dividend, by the assignee of an insolvent debtor, will not support an allegation of a payment by the debtor himself.

This was an action of debt, brought by the plaintiff, as assignee under the insolvent law of Massachusetts, of P. and B. S. Hale, insolvent debtors. The declaration alleged that the defendant,

before the application of the Hales in insolvency, had received of them $260 49 as usurious interest, and claimed to recover threefold the amount, by virtue of the act of 1836, chap. 35. To support the allegations, the plaintiff gave in evidence an account settled between the defendant and the Hales in January 1, 1840, including the charges contended to be usurious, by a note for $1,958 91, payable in sixty days. The judge, who tried the cause, ruled that the usurious interest was not paid until payment was made of the note in which it was included, and that the statute limitation of two years did not commence running, until such latter payment. To this ruling the defendant excepted. The defendant then proved that the note was paid at its maturity, by a memorandum check for $500, and $1458 91 in money; that this check was made an item of a subsequent account, which finally resulted in a balance of $1536 76 in favor of Lincoln, for which the Hales gave him a memorandum check; that this last mentioned check remained unpaid at the time of the insolvency of the Hales, and made an item of Lincoln's account against them, for which he received of the assignee thirty-five per cent. prior to the commencement of this suit. The judge ruled that these facts proved a payment to Lincoln by the Hales, on the 4th March, 1840. To this ruling the defendant also excepted. Other points were raised in the case, which it is not necessary to notice. The jury returned a verdict for the plaintiff.

J. P. Rogers and *J. P. Healy*, for the plaintiff. *William D. Sohier* and *C. A. Welch*, for the defendant.

Hubbard J. delivered the opinion of the court, that, while a debt, including a claim for usurious interest and other valid demands, remained unpaid, the law would first apply any payments which should be made to the valid demands; and that the payment to the defendant by the assignee of thirty-five per cent. did not support the allegation of a payment by the Hales. This was, therefore, a fatal variance, for which the verdict was to be set aside, and a new trial granted.

William D. Rice, et al. Petitioners, *v.* George B. Wallace.

Under the insolvent law of Massachusetts of 1838, it was held, that successive adjournments of the second meeting might be held, at each of which debts might be proved. It was also held, that objections to the debtor's discharge, made and filed by a majority of the creditors, might be withdrawn at a subsequent adjournment of the same meeting, and that the objections of a majority of the creditors who had proved their debts on or before the last adjournment of the second meeting, was necessary to prevent a discharge. [But see stat. 1844, c. 178.]

It appeared that George B. Wallace petitioned for the benefit

of the insolvent law of Massachusetts before George S. Hillard, a master in chancery for the county of Suffolk, and proceedings were duly had thereon. At the second meeting of his creditors, debts were proved; and the meeting being adjourned to another day, other debts were proved at the adjourned meeting. At the adjourned meeting a paper was filed, by which a majority of the creditors objected to the discharge. The meeting was again adjourned; and at the second adjournment, still other debts were proved, and a portion of the creditors who had before objected to the discharge, withdrew their objections. It then appearing, that neither a majority in number or in value of the creditors who had then proved their debts, continued to object, the master granted Wallace a certificate of discharge. The present petition prayed for an order to the master, prohibiting him from granting a discharge to Wallace, or requiring him to revoke the same if already granted, on the ground, that the filing of the objections by the creditors superseded the jurisdiction of the master in the premises, and that the debtor could then obtain his discharge only by appeal to the supreme judicial court.

Edward Blake, for the petitioners.
Annis Merrill, for the respondent.

Shaw C. J. delivered the opinion of the court. The second meeting of the creditors may be adjourned, for sufficient cause, by the master; and successive adjournments of the same meeting may be held, all of which constitute the second meeting. At any time during the continuance of the second meeting, debts may be proved. And if objections are filed to the debtor's discharge, and subsequently, during the continuance of the second meeting, other debts are proved, by which the objecting creditors are outnumbered, the objections are superseded. All that is done at the second meeting, is considered as done simultaneously, and the majority of creditors required to render the objections effective, must be a majority of all who have proved their debts during the continuance of the second meeting. In the present case, indeed, the petitioners cannot reasonably object to the effect of such adjournments, since the objections were not filed, and all the objecting creditors had not proved their debts, until one adjournment of the second meeting had been had. It is the opinion of the court, that the master rightfully granted the discharge. It is to be observed, that these proceedings occurred before the statute of 1844 went into operation. Under that statute, as has been already decided, a debtor cannot claim his discharge, until the expiration of six months from the date of the assignment. The petition is dismissed.

Digest of American Cases.

Selections from 5 Metcalf's Massachusetts Reports. Continued from page 201.

EVIDENCE.

11. A plaintiff, who calls for the defendant's books at the trial, and upon their being produced, claims the benefit of entries made therein to his credit, thereby makes the books *primâ facie* evidence only, and may therefore contest and disprove the charges therein made against him by the defendant. *Raymond* v. *Nye*, 151.

12. If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on him who alleges a disseizen; and that burden remains on him, even after he has given *primâ facie* evidence of a disseizin. *Brown* v. *King*, 173.

13. Where the proprietor of a wharf, which is bounded on an arm of the sea, claims the flats to the channel, viz. to low water mark, the burden of proof is on him to show that there was an original natural channel, from which the sea did not ebb at low water, and that each channel, or low water mark, was so far below his wharf as to include the flats which he claims. *Ashby* v. *Eastern Railroad Co.* 368.

14. The report of an auditor, appointed under the revised Sts. c. 96, § 25, to state the accounts of parties to an action, is *primâ facie* evidence on the trial of the action by a jury, and changes the burden of proof. *Jones* v. *Stevens*, 373.

15. When, on the trial of a cause, a party offers in evidence an auditor's report, which contains statements respecting a matter upon which he had no authority to pass, it is within the discretion of the court to reject the whole report, or to recommit it, or to receive in evidence those parts of it which are admissible, and reject the other part. *Ib.*

16. Where A., who was taxed for land, denied, when called on for payment, that he was rightfully taxed, and directed the collector to call on B., the owner of the land, and the collector thereupon called on B 's wife, in the absence of B , and she paid the tax, and A. afterwards repaid her, and took the receipt which the collector had given her; it was held, in an action by A., against selectmen for refusing his vote, on the ground that he had not paid the tax, that they might show that A. did not occupy the land for which he was taxed, as that fact had a bearing on the question whether the wife of B., in paying the tax, acted as A.'s agent, and whether she called on A. for repayment. *Humphrey* v. *Kingman*, 162.

17. A. shipped on board B.'s vessel for a fishing voyage, and signed a shipping paper, in which it was agreed that A. should have a certain proportion of the fish that he should take on the voyage, or the proceeds thereof, and that B. should render to A. an account of the delivery or sales of all such fish. Before the vessel sailed on the voyage, A. drew an order on B., requesting him to pay to C. or order, a certain sum at the end of the voyage, if he (A.) should make enough to pay said sum; which order B. accepted. In a suit against B. on this acceptance, it was held, that although it was proved that B. might have sold the fish, soon after the arrival of the vessel, for a sum sufficient to pay the order, and that, by delaying the

sale, he did not obtain a sum sufficient for that purpose; yet, if he acted in good faith, and sold the fish within a reasonable time, he was not liable to the holder of the order; and that, for the purpose of proving that he acted in good faith, and made the sale in a reasonable time, evidence was admissible of the custom of those employed in like fishing voyages, to delay the sale of fish as long as B. had delayed in this instance. *Bradford* v. *Drew*, 188.

18. Where, in the trial of an action between A. and B., it was made a question whether A. and C. were partners in the matter of the suit, and ought to have joined in bringing the action, letters written by C. to B., but not communicated to A., are not admissible in evidence. *Jones* v. *Stevens*, 373.

19. The declaration of a person while he was in possession of land, claiming it as owner, that his line extended to a certain boundary which he pointed out when he made the declaration, is admissible in evidence, after his decease, on a trial of a question concerning the boundary line of the same tract of land. *Daggett* v. *Shaw*, 223.

20. Where an award was, "each party shall pay one half of the expenses arising from this rule, and they shall settle even all accounts and demands previous to the date" of the award, the testimony of the arbitrators is admissible, in a subsequent suit between the parties, to show that they allowed, in their award, certain damages that are claimed by the plaintiff in the subsequent suit, and set them off against the demands of the defendant. *Hodges* v. *Hodges*, 205.

EXCEPTIONS.

A defendant, on being convicted of an offence in the court of common pleas, at the March term thereof, alleged exceptions to the opinion of the court, and entered into a recognizance to enter and prosecute the same, not at the supreme judicial court "next to be held for the same county," as the law requires, and which was in April, but at the next November term of that court: The defendant not having entered his exceptions either at the April or November term, the attorney general filed a complaint, setting forth the facts, and praying the court to order a capias to be issued and the defendant to be brought into court. The court held, that they had jurisdiction of the cause, and ordered a capias to issue against the defendant. On his being brought in, his counsel declined to argue the exceptions and the court awarded sentence against him on his conviction. *Commonwealth* v. *Dow*, 329.

2. Under the Rev. Sts. c. 82, § 12, exceptions may be alleged to the opinion, direction or judgment of the court of common pleas upon an award made under c. 114 of the same statutes: The provision, in § 13 of the latter chapter, for a writ of error in such case, is merely cumulative. *Eaton* v. *Hall*, 287.

EXECUTOR.

In a suit to recover a legacy of an executor, who is residuary legatee, and has given bond, pursuant to the Rev. Sts. c. 63, § 3, to pay all the debts and legacies of the testator, the plaintiff is not required to give any other proof, besides such bond, that the defendant has assets in his hands. And it *seems*, that such executor, who has given such bond, is bound to perform the condition of his bond, although he has not assets. *Jones* v. *Richardson*, 247.

2. Where a testator, by his will, authorizes his executors to sell and convey his real estate which is not specifically devised, at such times as they shall think proper, and such sale is not required for the purpose of effecting any other provisions of the will, the executors have a mere naked power to sell, not coupled with a trust. *Shelton* v. *Homer*, 462.

3. Where a testator by his will gives a naked power to his executors, or such of them as shall take upon themselves the probate of his will, to sell and convey his real estate, and appoints two executors, who accept the trust and cause the will to be proved, and one of them afterwards resigns his trust, as executor, and is discharged therefrom by a decree of the probate court, the other executor has no authority, by the will, to sell and convey the testator's real estate: But if he has such authority, yet if he makes a contract for the sale of such estate to the executor who has resigned, he being one of the testator's heirs and devisees, and also, by the testator's will, trustee for other

heirs and devisees, the court will not enforce specific performance of the contract, on a bill in equity; contracts, by which a trustee becomes the purchaser of the trust estate, being contrary to the policy of the law. *Ib.*

FORCIBLE ENTRY AND DETAINER.

Where the relation of landlord and tenant does not exist, a party entitled to the possession of lands or tenements cannot maintain the summary process by complaint, provided by the Rev. Sts. c. 104, in cases of forcible entry and detainer, unless there has been an actual forcible entry or detainer, by violence or threats of violence in taking or keeping possession, or some act or threat of force adapted to alarm the party, or deter him from apprehension of forcible resistance. Such complaint is not sustained by proof of a mere unlawful entry into a house, after the owner has forbidden such entry, and a refusal to leave it, after repeated orders to leave it, without proof of the use of any violence or threats of violence, or any show of a determination forcibly to make the entry, or forcibly to resist the entry of the owner. *Saunders* v. *Robinson*, 343.

FUGITIVES FROM JUSTICE.

The provision of the Rev. Sts c. 142, § 8, for the apprehension of persons charged with the commission of offences in other states, is not repugnant to the constitution or laws of the United States. *Commonwealth* v. *Tracy*, 536.

HUSBAND AND WIFE.

A married woman, whose land is delivered up on a writ of *habere facias* issued on a judgment against her husband, may make a formal entry on the land, (if her husband does not object,) for the purpose of preventing the statute bar of her right of entry. *Melvin* v. *Proprietors of Locks & Canals*, 15.

2. By Stat. 1786, c. 13, a married woman was barred of her right of entry, unless she made entry within thirty years next after that right accrued. *Ib.*

3. A husband subscribed for shares in the stock of a bank, and on paying the instalments, he stated that the shares were his wife's, and that she would have something to live upon, if he should spend all his property. He took receipts as for payments made by her, which payments were entered in the book of the bank as made by the wife, and a certificate was issued to her as owner of the shares. The husband afterward purchased shares in the same bank, in his own name, and sometimes pledged the same to the bank as security for loans made to him, but never so pledged, nor proposed so to pledge, the shares that stood in his wife's name. He received dividends as long as he lived, on the shares that stood in his own name and on those that stood in the name of his wife, and always requested the cashier of the bank to give him the money in two distinct and separate sums; and he sometimes asked for particular kinds of money for his wife, in payment of the dividends on the shares that stood in her name. Held, on the husband's death, that the wife was entitled, as against his heirs at law, to hold the shares that stood in her name as her own property: there having been a gift thereof to her by her husband, valid as against all persons except his creditors, who might resort to the shares for payment of their debts, if he did not leave other property sufficient to pay them. *Adams* v. *Brackett*, 280.

4. Money deposited in a bank by a married woman who, with her husband's consent, lives separate from him, and is not supported by him, is his money, although it is deposited in her name, and he makes no attempt to obtain possession of it. His creditors may attach it by the trustee process, and they will hold it, although the wife obtain a decree of divorce from bed and board for a cause that existed before such process was served. *Ames* v. *Chew*, 320.

INDICTMENT.

Two or more distinct offences may be included in one indictment, in several counts, where the offences are of the same general nature, and where the mode of trial and the nature of the punishment are also the same. *Carlton* v. *Commonwealth*, 532; *Booth* v. *Commonwealth*, 535.

2. Where one is licensed as a "taverner," under Rev. Sts. c. 47, § 21, to sell fermented liquor only, he cannot be convicted of selling spirituous liquor, on an indictment which alleges that he

sold it "without being duly licensed as an innholder." In such case, the indictment should allege that the defendant, being licensed as an innholder, with authority to sell fermented liquor only, did sell spirituous liquor. *Commonwealth* v. *Thayer*, 246.

3. An indictment under the Rev. Sts. c. 47, § 3, is good, which alleges that the defendant, on, &c. at, &c., without any legal authority or license, "did presume to be and was a retailer of spirituous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spirituous liquors to" a person named. *Goodhue* v. *Commonwealth*, 553.

INSOLVENT DEBTORS.

An assignee of an insolvent debtor, under St. 1838, c. 163, may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he cannot, by discontinuing such action and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them. *Butler* v. *Hildreth*, 49.

INSURANCE.

A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days. *Atkins* v. *Boylston F. & M. Ins. Co.* 439.

2. A commission merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage. *Putnam* v. *Mercantile Marine Ins. Co.* 386.

3. Where a part owner of a vessel effects insurance for himself and the other owners, without their previous authority, they may ratify his act after they obtain knowledge of the loss of the vessel: And the bringing of an action on the policy, in their names, is a sufficient ratification of his act. *Finney* v. *Fairhaven Ins. Co.* 192.

JUDGMENT.

A judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by the way of set-off. *Jones* v. *Richardson*, 247.

2. By St. 1840, c. 87, the judgment of the court of common pleas upon a plea in abatement is not the subject of appeal, writ of error, or exceptions, but is final in that court. *Browning* v. *Bancroft*, 88.

3. When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. *Christian* v. *Commonwealth*, 530.

4. The court, after reversing a judgment in a criminal case, cannot enter such judgment as the court below ought to have entered, nor remit the case to the court below for a new judgment. And this rule applies to a case where a sentence has been awarded, to take effect after the expiration of a former sentence, and the prisoner brings a writ of error to a hearing before the expiration of the former sentence. *Ib.*

JURY.

It is to be presumed that jurors understand the instructions of the court in matters of law; and where proper instructions are given to them, a new trial will not be granted on the suggestion that they did not rightly understand the instructions. *Raymond* v. *Nye*, 151.

LIEN.

Where a negotiable note is indorsed to a bank by the payee, as collateral security for one only of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser: And in a suit on such indorsed note, brought by the bank against the maker, after the demand which it was pledged to secure has been paid, the maker, acting under the authority of the indorser, may successfully defend against the right of the bank to recover. *Neponset Bank* v. *Leland*, 259.

LIMITATIONS, STATUTE OF

The provision in the Rev. Sts. c. 120, § 9, that the time of a party's absence and residence out of the state shall not be taken as any part of the time limited for the commencement of an action against him, does not apply to a case in which the action was barred by the statute of limitations that was in force before the revised statutes went into operation. *Wright* v. *Oakley*, 400.

2. The provision in the Rev. Sts. c. 120, § 18 — that one of two or more joint contractors shall not lose the benefit of the statute of limitations by reason of part payment made by any of the other contractors — extends to contracts and payments made before those statutes were passed. *Peirce* v. *Tobey*, 168.

3. Where a minor makes a payment on a joint note given by him and an adult, and after he comes of age makes an oral promise to pay the balance, he thereby so ratifies his former payment, that it will take the note out of the operation of the statute of limitations, as to himself, but not as to the adult. *Ib.*

MANUFACTURING CORPORATION.

Under Sts. 1808, c. 65, § 6, and 1817, c. 183, an execution against a manufacturing corporation cannot be levied on the property of its members, unless there has first been a demand on the president, treasurer, or clerk of the corporation, by the officer who holds the execution, to show to him property sufficient to satisfy and pay the sum due thereon; although, on the original writ, property of the members was attached, after a default of the corporation to show to the officer, who held the writ, property sufficient to satisfy the judgment which might be recovered thereon. *Stone* v. *Wiggin*, 316.

MIDDLESEX CANAL.

Under the St. of 1793, c. 21, incorporating the proprietors of the Middlesex canal, which provided that any person who should be damaged by said proprietors, by their flowing his land, should have compensation therefor by application to a court within one year from the time of the damage done, it was held, that the damage was done to the land owner, when said proprietors' permanent dam across Concord river was completed, for the purpose of raising a head of water for the supply of their canal, and that he had no remedy by application to a court after a year from that time had elapsed. *Heard* v. *Proprietors of Middlesex Canal*, 81.

MILLS.

Where a mill-owner has acquired a prescriptive right to keep up a dam constantly, which, in its usual operation, would raise the water to a certain height, although from the leaky condition of the dam, or the rude construction of the machinery in his mill, or the lavish use of the stream, the water has not been usually and constantly kept up to such height, yet if he repair the dam, without so changing it as to raise the water higher than the old dam, when tight, would raise it, or if he use the water in a different manner, and thereby keep up the water more constantly than before; this is not a new use of the stream, for which a land owner can claim damages, but is a use conformable to the mill owner's prescriptive right. *Cowell* v. *Thayer*, 253.

MORTGAGE.

One who had mortgaged land, to secure a debt due on bond, was appointed administrator of the estate of the mortgagee, and returned an inventory of his intestate's property, including therein the debt due from himself on the bond: He afterwards settled his first administration account, in which he charged himself with the amount of the personal estate returned in the inventory; and his second account, in which he charged himself with the balance of the first: Thereupon the probate court passed a decree, ordering him to distribute the balance of the account remaining in his hands, among the heirs of the intestate. Held, that by these proceedings, the debt due on the bond was paid; and that a subsequent assignment of the bond and mortgage, by the administrator, transferred to the assignee no interest in the land. *Ipswich Manuf. Co.* v. *Story*, 310.

2. Where A., the owner of land, agrees to sell it to B., and to convey it to him by deed when B. shall erect a house thereon, and B. agrees to erect a house thereon, and that he will, on receiving a deed of the land, mortgage it

to A. to secure the purchase money, B. does not, by erecting the house, acquire any property therein, but the same becomes a part of the realty; and a mortgage of the house by B. before he receives a deed of the land, conveys nothing to the mortgagee. *Milton* v. *Colby*, 78.

3. Where goods are mortgaged after they are attached, and the mortgagor dies before they are taken in execution, and his administrator receives the goods from the attaching officer, on paying him his fees and charges, (as required by Rev. Sts. c. 90, § 106,) the mortgagee is entitled to possession of the goods, as security for the mortgage debt, and may maintain an action for them against the administrator, after demand thereof, without paying or tendering to him the amount of fees and charges so paid by him. *Parsons* v. *Merrill*, 356.

MUNICIPAL COURT.

The St. of 1843, c. 7, which enacts that "all the duties, required by law to be performed by the judge of the municipal court, shall be performed by the justices of the court of common pleas, or by some one of them," is not repugnant to the constitution of the commonwealth. *Brien* v. *Commonwealth*, 508.

2. The office of judge of the municipal court was virtually abolished by the St. of 1843, c. 7, which transferred its duties to the court of common pleas. *Ib.*

NUISANCE.

A plaintiff may recover damages for the *continuance* of a nuisance, viz. a dam across a stream that passes through his land, though his declaration alleges that the stream has long been obstructed by means of a dam *erected* by the defendant. *Hodges* v. *Hodges*, 205.

OFFICER.

The Rev. Sts. c. 90, did not make it the duty of an officer, who attaches real estate, to deposit in the clerk's office the writ, or a copy thereof, with the return of the attachment. That duty was first imposed on such officer by St. 1838, c. 186. *Goodnow* v. *Willard*, 517.

2. After the revised statutes went into operation, and before the passing of St. 138, c. 186, an officer was directed to "attach specially," without directions as to the property to be attached: He thereupon attached sufficient real estate; but the attachment was lost in consequence of an omission to deposit a copy of the writ, &c. in the clerk's office, within three days. Held, that the officer had obeyed his directions, by attaching the real estate, and that he was not answerable to the creditor for the loss of the attachment, although there was sufficient personal property of the debtor, which might have been attached. *Ib.*

3. An officer who has a legal warrant to arrest A., who is charged with larceny in another state, and with being a fugitive from justice, does not abuse the process, nor forfeit his protection under such warrant, by holding at the same time a power of attorney from one who claims the custody of A. as a fugitive slave, and is proceeding to carry him before the proper tribunal, to obtain a certificate according to the law of the United States. *Commonwealth* v. *Tracy*, 536.

4. An officer returned on a warrant directing him to search the buildings of S. for certain described stolen goods, "By virtue of this warrant, having made diligent search and found three pieces of goods in the house of the within-named S. and arrested the body of the within-named S. and have him," &c. Held, that this return furnished *primâ facie* evidence, at least, that the officer had found three pieces of the goods described, and that he was therefore justified in arresting S. and carrying him, with those goods, before a magistrate. *Stone* v. *Dana*, 98.

PARISH AND RELIGIOUS SOCIETY.

Where a person withdraws from a parish, in the manner provided by the Rev. Sts. c. 20, § 4, after the parish has granted a sum of money to defray its expenses, and before the expiration of the parochial year for which the money is granted, and a tax to raise the sum granted is not assessed until after the expiration of such year, and after a new valuation of estates is taken, and is then assessed on that valuation, such person cannot be legally included in such assessment. *Dow* v. *First Parish in Sudbury*, 73.

2. Where persons, in the year 1824, formed themselves into an association for religious purposes, without any lay organization under St. 1823, c. 106, or otherwise, but solely under the advice and direction of the ministers and elders of their denomination, and entered into an agreement, which they afterwards fulfilled, to support and maintain public worship, it was held, that they constituted a religious society under St. 1811, c. 6, and became competent, as such, to take grants or donations, and to prosecute an action of trespass to maintain and defend the possession of real estate granted or leased to them for their use as a religious society. Held, also, that the members of such society were competent witnesses for the plaintiffs in such action, within the intent of the Rev. Sts. c. 94, § 54. *Macomber* v. *Christian Society in Plymouth*, 155.

PARTITION.

A debtor made three mortgage deeds at the same time, of the same land, to secure payment of different sums, on the same day, to three of his creditors: The deeds were recorded at the same time, and no preference or priority was intended by the parties: The mortgagor subsequently made partial payments in different proportions to each of the mortgagees; and after condition broken he surrendered possession of the land to each of them, on the same day, who entered for foreclosure: One of the mortgagees thereupon filed a petition against the others for partition of the land. Held, that although the mortgagees were tenants in common in proportion to the amount of the balance of their several debts, yet that, until foreclosure, their estate in the land was not the subject of partition. *Ewer* v. *Hobbs*, 1.

2. A. being owner of land, as tenant in common with B., in equal moieties, devised his moiety, in fractional parts, to four devisees: B. afterwards died intestate, and his moiety descended to his five heirs at law, four of whom were said devisees of A.: The moiety of the land that descended to B.'s heirs was divided, by process from the probate court, from the other moiety, and set off to them: One of A.'s devisees afterwards filed a petition for partition of the moiety devised, praying that his portion thereof might be set off to him in severalty. Held, that the petitioner was entitled to partition as prayed for, and was not bound to include in his petition the moiety which descended to the heirs of B. *Allen* v. *Hoyt*, 324.

PARTNERSHIP.

When real estate is purchased by partners, with the partnership funds, for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them, in their partnership capacity, clothed with an implied trust that they shall hold it, until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow of such deceased partner has no right to dower in such real estate, nor have his heirs any beneficial interest therein, or in the rents received therefrom after his death, until the surviving partner is so indemnified. *Dyer* v. *Clark*, 562: *Howard* v. *Priest*, 582.

2. Under St. 1838, c. 163, the assignees of an insolvent debtor, who is surviving partner of a firm, are entitled, as against the widow and heirs of the deceased partner, to all the real estate of the partners, which was purchased with the partnership funds, for the partnership business, and to the rents and profits thereof, to be applied towards payment of the debts of the firm. *Howard* v. *Priest*, 582.

PAUPERS.

Under St. 1821, c. 94, § 2, and Rev. Sts. c. 45, § 1, which provide that a citizen, "having an estate of inheritance or freehold, in any town, and living on the same three years successively, shall gain a settlement in such town," he

does not gain a settlement by thus living on an estate, which he has in remainder, as tenant of the owner of the preceding estate of freehold. The statutes refer to such an estate as the party has a right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in another. *Inhabitants of Ipswich* v. *Inhabitants of Topsfield*, 350.

2. Where an insane person, who is not able to pay for his own support, is confined in a house of correction, under St. 1836, c. 223, the town in which he has a settlement is liable for his support in such house, if he have no parent, master or kindred, liable by law to maintain him. *Watson* v. *Inhabitants of Charlestown*, 54.

PAYMENT.

A debtor gave his creditor a mortgage of personal property to secure a balance of account; the dealing of the parties was afterwards continued, and the debtor, on being pressed for payment on account, told the creditor that he would endeavor to pay him for the articles he had received after the mortgage was given, and keep the subsequent accounts paid up; but that, as the creditor had security on the former part of the accounts, he must wait for payment of that part. The debtor afterwards made payments, from time to time, which were credited to him, generally, on the creditor's book, and which exceeded the amount that was due when the mortgage was given, but were less than the amount of the articles afterwards furnished to him by the creditor: At the time when these payments were made, the creditor considered them as made towards payment of the articles furnished to the debtor subsequently to the mortgage: The creditor sold part of the mortgaged property, and took part thereof to his own use; but the property, so taken by him, and the money received on the sale, were not sufficient to discharge the balance due to him when the mortgage was given. Held, that the payments made after the giving of the mortgage, though credited generally, on the creditor's book, might be applied by him towards payment of the subsequent accounts; and that he was not chargeable in the process of foreign attachment, as trustee of the debtor, by reason of his retaining part of the mortgaged property, and the proceeds of the sale of the other part thereof. *Capen* v. *Alden*, 268.

2. A. and B. mortgaged their land to C. to secure a note made by A., payable to C. or his order: C. assigned the mortgage and note to D., but did not indorse the note; and A. had notice of the assignment: D. brought an action on the note, in the name of C., against A., and B. afterwards paid the amount of the note to C. and took his receipt. Held, that this payment, though made by B. in good faith, and without actual notice of the assigment, could not avail A. as a defence, whether it was made at his request or without his request: and that D. was entitled to judgment, in C.'s name, on the note. *Merriam* v. *Bacon*, 95.

PEW.

Where a meetinghouse is conveyed to trustees for the use of a certain church and society, for a place of public religious worship for such church and society, and for no other use, intent or purpose whatsoever, and in the deeds of the pews in such house, which are given to an individual, the provisions of the conveyance of the house are referred to and recognized, the pew-owner has a right to the sole use of his pews on all occasions when the house is occupied, though it be opened for purposes different from those mentioned in the conveyance thereof; and he has a right to exclude all others from his pews, on such occasions, by fastening the pew doors, or otherwise, in such manner as not to interrupt or annoy those who may occupy other pews; and any person who enters such pews, knowing the facts, is a trespasser, and liable to an action by the owner. So if the owner of such pews cover them in an offensive manner, for the purpose of excluding others, and any person, in removing the offensive covering do any unnecessary injury to the pew or its fixtures, he is liable to the owner in an action of trespass. *Quære* as to the rights of pew-holders, in meetinghouses generally, to the exclusive occupation of their pews when the house is opened for purposes not connected with public religious worship of the society which owns the house. *Jackson* v. *Rounseville*, 127.

PILOT AND PILOTAGE.

By the 32d chapter of the Revised Statutes, every branch pilot, who offers his services to the master of an inward-bound vessel, before she has passed the line designated in § 24 of that chapter, is entitled to full fees of pilotage, whether his services are accepted or not. *Commonwealth* v. *Ricketson*, 412.

2. Any master of a vessel may, in all cases, pilot his own vessel into Boston harbor, liable only to the payment of pilotage fees when a Boston pilot seasonably offers his services. But if no Boston pilot seasonably offers his services, the master may employ any other person to pilot his vessel in, and such person may do so, without incurring any penalty. *Ib.*

3. When a Boston pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master of the vessel does not accept the services, but employs a person who is not authorized as a pilot for said harbor, to pilot his vessel in, the master thereby incurs no penalty; but such person, by undertaking to pilot the vessel in, incurs the penalty imposed by the Revised Statutes, c. 32, § 23. *Ib.*

4. The payment of pilotage fees by a master of a vessel, who has declined an authorized pilot's seasonable offer of service and employed an unauthorized person to pilot the vessel in, is not the payment of a penalty, and is no bar to an indictment against such person for undertaking to pilot such vessel in. *Ib.*

5. The pilots, who are authorized to pilot vessels through the Vineyard Sound, over Nantucket Shoals, have no authority, by the Rev. Sts. c. 32, § 42, to pilot the same vessels into Boston harbor: And when one of them undertakes to pilot one of such vessels into that harbor, at the request of the master thereof, and is indicted for so doing, his warrant, as such pilot, is not admissible in evidence, in his defence, even for the purpose of showing that he was lawfully on board such vessel. *Ib.*

6. Under the Rev. Sts. c. 32, § 24, it is a sufficient offer of a pilot's services, in the night, to the master of a vessel bound into Boston harbor, if the pilot approaches such vessel and hails her, and makes all the tender which the time and circumstances permit, and his hail is heard on board, though it is not answered: It is not necessary, in such case, that there should be an actual offer to the master, and that he should have actual knowledge of such offer. *Ib.*

7. When an authorized pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master, without requiring the pilot to show his warrant, declines to accept his services, and employs an unauthorized person to pilot his vessel in, and such person is indicted for undertaking to pilot her in, he cannot defend on the ground that there is no proof that the pilot had his warrant with him when he offered his services. *Ib.*

PLEADING.

(*Parties to suits.*) A., the owner of a wharf, entered into a written agreement, not under seal, with B. and C., that certain machinery and fixtures should be erected on the wharf, at their common expense, and that the profits of the business to be carried on there should enure to their common benefit. A rail road was afterwards constructed across the flats below the wharf, and A., B. and C. joined in a petition for a jury to assess the damages thereby sustained by them, and alleged in their petition that they were the owners of the wharf, &c. Held, that if the jury believed, on all the evidence before them, that the petitioners had such an interest in the estate as entitled them to damages, and that they suffered damages jointly, then they properly joined in the petition, and were entitled to recover. *Ashby* v. *Eastern Railroad Company*, 368.

2. (*Declaration.*) Where a suit is brought against the maker of a note which has been indorsed to a firm, and the plaintiff describes himself as surviving partner of the firm, it is not necessary (since the establishment of the rules of the court at March term, 1836) that the declaration should aver either a demand of payment and a refusal; or the name or death of the other member of the firm; or that the defendant did not pay the note to the firm, while it continued, nor to the plaintiff, after the firm was dissolved. *Knowles* v. *Byrnes*, 115.

3. In an action against selectmen for refusing to receive the vote of a qualified voter, or for omitting to put his

name on the list of voters, the declaration must aver, specifically, all the facts which constituted the plaintiff's qualifications to vote at the meeting at which his vote was refused, and that he, before offering his vote, furnished the defendants with sufficient evidence of his having those qualifications. *Blanchard* v. *Stearns*, 298.

POOR DEBTORS.

Where two magistrates meet at the time and place appointed for the examination of a debtor committed on execution, and adjourn to a future day, and only one of them is able to attend again on that day, another magistrate may attend instead of him who is absent, and the two who are thus present may lawfully proceed to examine the debtor and administer to him the poor debtor's oath. *Brown* v. *Lakeman*, 347.

PRESCRIPTION.

Where a party exercises an offensive trade in the same place for more than twenty years, with no molestation or interruption, except a suspension thereof for two years before the twenty years elapse, he does not, by such suspension, lose his right, unless it appears that he intended to abandon and not resume the exercises of such trade. *Dana* v. *Valentine*, 8.

PROMISSORY NOTE.

A note given by a judgment debtor to the assignee of the judgment, in part payment thereof, is on a sufficient consideration. *McClees* v. *Burt*, 198.

2. Where the payee of a promissory note, which is in the hands of his attorney, indorses it *bonâ fide* to a third person, and leaves it in the attorney's hands for the use of the indorsee, the attorney thereby consents to hold it for the indorsee, and becomes his agent; and if the attorney bring an action on the note in the indorsee's name, which he sanctions, this is proof of actual transfer and constructive delivery of the note, though the indorsee never sees it. *Richardson* v. *Lincoln*, 201.

3. An indorsement of a note "without recourse," transfers the whole interest therein, and merely rebuts the indorser's liability to the indorsee and subsequent holders. But such indorsement, with other circumstances, may tend to show that the note was not indorsed for value, so as to prevent the promisor from making the same defence in an action by the indorsee, which he might make in an action by the promisee. *Ib.*

4. Where the indorser and holder of a note reside in the same place where the note is dishonored, notice of the dishonor must be given to the indorser personally, or at his domicil or place of business, and not through the post office. *Peirce* v. *Pendar*, 352.

5. P. went with his family to Bangor, in the autumn of 1835, and lived at board with his family, in different houses in that place, until the autumn of 1836: During this time, P. was often absent on business, and once took his family, for some weeks, to another place: He had a place of business in the counting room of W. & R., and no other place of business in Bangor; and his papers were left, during his absence, in the care of W., and were not taken away till the autumn of 1836: On the 26th of July, 1836, a note, which was indorsed by P., fell due and was dishonored, at Bangor, by the maker's refusal to pay it; and it did not appear whether P. was or was not in Bangor on that day. Held, that P., on said 26th of July, had a domicil and place of business in Bangor, at one of which, if he was then absent, notice of the dishonor of the note should have been left. *Ib.*

6. A note payable to P. or order, and indorsed by P. & R., was lodged in a bank in the city of B., where the maker and the indorsers had a domicil, when the note fell due: The note was presented, by a notary public, to the maker for payment, which was refused; whereupon the notary made out a notice for P., directed for him at B., and put it into the post office at B.: In a suit by the holder of the note against P. as indorser, the notary testified that he "was not able to find P. or any body who could tell him where he was; that he inquired of the cashier of the bank, and others, for P.'s residence, but was unable to learn from any one where he then resided:" He did not, however, make any inquiry of the maker or second indorser respecting P.'s residence. Held, that the notary had not used that

reasonable diligence to ascertain P.'s residence, which would excuse the want of legal notice to him of the dishonor of the note. *Ib.*

7. An action may be maintained upon a note, against the maker, where the writ is made after sunset on the last day of grace, and is delivered to an officer on the next day, although there is no demand of payment before the writ is made. *Butler* v. *Kimball*, 94.

8. In a suit by A. on a note given to him in satisfaction of a judgment recovered against the promisor by B., the promisor cannot defend by showing that A., before said judgment was recovered, purchased of B. the demand which was the subject matter thereof, and afterwards, on the trial of the action, testified as a witness against the promisor. *McClees* v. *Burt*, 198.

RAIL ROAD.

By St. 1838, c. 9, § 3, the annual payment which the Western Rail Road Corporation is required to make, from its income, to the sinking fund, is to be made from its net income; that is, from the amount of money remaining to the corporation, on making up its annual account, after deducting from all its receipts the necessary expense of repairs and management, and also the amount of interest on the debt of the commonmonwealth, which the corporation are bound to pay in behalf of the commonwealth: And if such net income, in any year, is not sufficient for such payment, the corporation cannot be required to make up the deficiency from the income of succeeding years. *Opinion*, 596.

2. Where the value of a wharf is impaired by the construction of a rail road across the flats below it, the owner is entitled to recover of the proprietors of the rail road the damages thus sustained by him. *Ashby* v. *Eastern Rail Road Company*, 368.

SEARCH WARRANT.

The Rev. Sts. c. 142, § 3, which direct that search warrants shall command the officer, to whom they are directed, to bring before a magistrate stolen property, or other things, when found, "and the persons in whose possession the same shall be found," have made no such change in the law as to render necessary any alteration in the form of such warrants. It is still proper to insert in a search warrant the name of the person in whose building, &c., the complainant swears that he suspects the goods are concealed, and to order the officer to arrest such person, if the goods are found in his possession. *Stone* v. *Dana*, 98.

SELECTMEN.

Selectmen have authority, even after the opening of a town meeting, to strike from the list of voters the name of a person who is not a legal voter. *Humphrey* v. *Kingman*, 162.

SENTENCE.

Where a defendant is found guilty, generally, on an indictment which charges him with several distinct offences, it is not necessary that separate sentences should be awarded: A single sentence is legal, if it do not exceed the sum of several sentences which might be awarded. *Carlton* v. *Commonwealth*, 532; *Booth* v. *Commonwealth*, 535.

SET-OFF.

A writing given by a child to a father, acknowledging the receipt of an advancement, cannot be used by way of set-off in a suit by the child to recover a legacy given to him in a will afterwards made by his father, nor as evidence of the payment or ademption of such legacy. *Jones* v. *Richardson*, 247.

SHERIFF.

A sheriff is not so interested in an action of replevin brought against his deputy for property attached by him, as to authorize a coroner, under Rev. Sts. c. 14, § 97, to serve the writ of replevin on the deputy. *Browning* v. *Bancroft*, 88.

SUBORNATION OF PERJURY.

Subornation of perjury may be proved by the testimony of one witness. *Commonwealth* v. *Douglass*, 241.

2. Though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false,

he cannot be convicted of the crime charged. *Ib.*

3. To constitute subornation of perjury, the party charged must procure the commission of the perjury, by inciting, instigating or persuading the witness to commit the crime. *Ib.*

TOWN.

An agreement for the purchase of land for a town, made by all the members of a committee duly authorized by the town to purchase it, and put in writing and signed by part of the committee, on behalf and at the verbal request of the committee, is the written agreement of the whole committee, and binding on the town. *Haven* v. *City of Lowell*, 35.

2. Where an agreement, made for the purchase of land for a town, by a committee of the town, is invalid, such agreement is ratified and confirmed by a subsequent vote of the town, authorizing the committee to complete the purchase of the land by them bargained and contracted for. *Ib.*

TRESPASS.

Trespass *quare clausum fregit* is the proper action for the violation of the right of possession of pews which the Rev. Sts. c. 60, § 31, declare shall be real estate. *Jackson* v. *Rounseville*, 127.

TRUST AND TRUSTEE.

K., being about to purchase land that was held in trust, made a contract with the trustee for the conveyance thereof, which contract in terms recognized the trust, and provided for its execution: K. subsequently required and received from the trustee and the *cestui que trust* a joint deed of the land, under circumstances which left it doubtful whether the purpose of such deed was to discharge the land from the trust: Afterwards, in an agreement between K. and the trustee for a resale of an undivided moiety of the land to the trustee, the terms of the first contract were recited, and were not declared to have been vacated: The *cestui que trust* afterwards aided in the organization of a corporation, and in the passing of a vote authorizing the purchase of said land by the corporation, without disclosing that he regarded the land as chargeable with a trust in his favor: The land was thereupon conveyed to the corporation, the sole members of which were the trustee, the *cestui que trust*, K. and his partners, who were affected with notice, and persons holding stock for the benefit of K. or his partners. Held, that the recital and agreement of resale revived the trust, if it had been waived by the joint deed of sale, and confirmed it if it had not been thereby waived. Held also, that the trust was not waived, as to the corporation, by the conduct of the *cestui que trust;* but that the corporation took the land subject to the existing trust. *Wright* v. *Dame*, 485.

TRUSTEE PROCESS.

A. attached the goods of B., his debtor, and caused them to be sold at auction on the writ, without conforming to the provisions of the Rev. Sts. c. 90, §§ 57–61, and himself became the purchaser of the goods, and took them into his possession. Held, in a process of foreign attachment, in which A. was summoned as trustee of B., that he could not set off the debt due to him from B. against the value of said goods, but that he was chargeable, as trustee of B., to the amount of the value of the goods. *Allen* v. *Hall*, 263.

WARRANT FOR TOWN MEETING.

A town duly passed a vote appointing a committee to purchase certain land for the site of a market house, to make an estimate of the expense of such house, and to report at the next town meeting: The warrant for the next town meeting was, "to hear reports of committees appointed to purchase land, and furnish an estimate of the expense of a market house; to see if the town will authorize their treasurer to borrow, on the credit of the town, such sum of money as may be necessary to enable said committee to purchase the land and erect a suitable building for a market house; or act on that subject as they think proper:" At that meeting, the committee reported that they had purchased the said land, and recommended that the town should purchase an additional lot of land, adjoining that already purchased, and thus obtain a more commodious site for the market house: Whereupon the town voted, (among other things,) that

said committee be authorized to purchase said additional land. Held, that the subject matter of this vote was so inserted in the warrant, as to give the vote full legal operation, under St. 1785, c. 75, § 5. *Haven* v. *City of Lowell*, 35.

WARRANTY.

A. agreed to deliver to B., in part payment of a debt, the note of W. indorsed by two other persons, and afterwards wrote to B. this letter: — "I enclose you the note of W.'s, indorsed as proposed, which you will please pass to my credit." Held, that this was a warranty that the indorsements on the note enclosed in the letter were genuine. *Coolidge* v. *Brigham*, 68.

WILL.

A testator, after giving the use and improvement of all his real and personal estate to his wife during her widowhood, made the following residuary devise: "I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession thereof when my wife's improvement ends: And if any or either of my said sons should die before they arrive to the age of twenty-one years, *or* should die without any legal heir of their body, then and in that case their share or shares shall descend equally to their surviving brother or brothers." Held, that each of the sons took an estate tail in one fifth of the land devised, with cross remainders. Held also, that if this clause in the will had given to the sons a fee simple, with a limitation over, by way of executory devise, then the devise over could not have taken effect, unless one or more of the sons had died before coming of age *and* without lawful issue. *Parker* v. *Parker*, 134.

2. A devise of "all the residue and remainder of my real estate" passes a fee, though no words of limitation or inheritance are added. *Ib.*

3. A devise of real estate, without words of inheritance, passes a fee, if the devisee is personally charged in the will with the payment of money to third persons. *Ib.*

4. A., owning an undivided moiety of lands and a dwellinghouse, devised to B., C. and D. each one fifth part of *all his real estate*, and to E. two fifth parts thereof, and to D. and E. each one fourth part of his dwellinghouse; without adding words of limitation or inheritance. Held, that D. and E. took the testator's moiety of the dwellinghouse, as a specific devise, and that B., C., D. and E. took the residue of his real estate in fee. *Allen* v. *Hoyt*, 324.

5. Where a testator devised one fifth part of all his real estate to S., the wife of A., and her children, A. having children at the time the devise was made, it was held that A. and her children took one fifth of the estate as tenants in common *Ib.*

6. The will of a testator was thus: "I give, bequeath and devise to my wife the following described pieces of land" (particularly describing them): "Also all my personal estate of every kind, wheresoever it may be found, which I may be possessed of at the time of my decease, after payment is made therefrom of my just debts, funeral charges and other necessary expenses. To have and to hold the same to her, her heirs, executors, administrators and assigns, to their use and behoof forever. The other part of my real estate is to be divided as the law directs:" The debts, &c. of the testator exceeded the value of his personal property. Held, that the real estate, devised to the wife, was not charged with the payment of his debts, &c., and that the undevised real estate should first be applied to the payment of the excess of the debts, &c., over the value of the personal property. *Adams* v. *Brackett*, 280.

7. A testator, after ordering all his debts to be paid, and giving certain legacies, devised one third part of all his estate, real and personal, of which he should "die seized," to C., to hold the same to her and her assigns forever; "the same to be paid to her" by his executors, as soon after his decease, as should, in their judgment, be most for the advantage of all concerned in his estate: The remainder of his estate, real and personal, of which he should "die seized," he devised to his minor children in equal proportions, to hold to them and their assigns forever, after payment, by his executors, of all his debts and legacies, "to be paid" by his executors to said children, severally, as they should come of age, or so much thereof as should remain of principal

and interest, after furnishing to them the means of support and education, till they should be qualified, on account of age, "to receive said legacies": The testator then ordered, that his executors should manage his estate and effects, and dispose of all his lands, chattels, &c., for the purposes above mentioned, at such time and in such manner, as should be most likely, in their judgment, to do justice to all his creditors, and be for the greatest advantage of all concerned in his estate; and he also directed his executors, in order to increase the proceeds of his estate, to sell the wood, growing on his land, separate from and previous to the sale of the land on which it was growing, except so much of the young wood as should, in their judgment, add to the amount of his estate, by being sold with the land. Held, that by the legal effect of the several provisions of the will, the executors had such a title and interest in the land of which the testator died seized, as authorized them to maintain an action of trespass *quare clausum fregit* for an illegal entry upon such land. *Dascomb* v. *Davis*, 335.

8. Where a testator devised land of which he obtained the right of possession by a judgment on a petition filed by him for partition, pursuant to Sts. 1783, c. 41, and 1786, c. 51, and after notice given, to all persons interested, of the pendency of such petition, it was held that he died seized of the land, although others, who claimed title thereto, occasionally entered upon it and cut wood thereon, after the judgment of partition. *Ib.*

9. A testatrix devised real estate to A., her nephew, in trust for P., her niece, and to her heirs and assigns forever, the income thereof to be paid to P. during her life. P. died before the testatrix, leaving issue, an infant daughter, who survived the testatrix. Held, that the trust was created for the benefit of P. only, and that A. therefore took no estate under the will, but that P.'s infant daughter took the devised estate in fee, by virtue of the will and of the Rev. Sts. c. 62, § 24. *Paine* v. *Prentiss*, 396.

WITNESS.

A grantor, who conveys land with warranty to A., bounding him on a certain line, and then conveys land to B. with warranty, bounding him on A.'s line, is a competent witness in a suit between A. and B., to testify as to the situation of the monuments on their dividing line, at the time of his conveyances, although those monuments do not exist at the time when he testifies. *Daggett* v. *Shaw*, 223.

2. In an action by an indorsee against one who signed a promissory note on the back thereof, the indorser is a competent witness to prove that the defendant signed the note at the same time with the promisor whose signature was on the face of the note. *Richardson* v. *Lincoln*, 201.

3. Under St. 1839, c. 107, § 2, an executor, who is plaintiff in a suit which he has no interest, except such as arises from his inability for costs and expenses of the suit, may be a witness in such suit, if there be first tendered to him such security for his liability for costs, as is sufficient, in the opinion of the court, to indemnify him on account thereof; and he need not also release his right to recover costs of the defendant in such suit, in order to enable him to testify. *Dascomb* v. *Davis*, 335.

4. The members of an association entered into for religious purposes, without any lay organization, but solely under the advice of the ministers and elders of their denomination, and who maintain public worship, are competent witnesses in a suit brought by or against such association. *Macomber* v. *Christian Society in Plymouth*, 155.

WRIT.

Where a suit is brought against three joint contractors, and the writ is served on two only, the two, by pleading the general issue, waive their right to object to the want of service on the third. *Bartlett* v. *Robbins*, 184.

2. Where a writ of error is brought upon a judgment in a criminal case, under St. 1842, c. 54, the prosecuting officer of the commonwealth is not bound to take notice and act thereon, until fourteen days after a *scire facias*, to hear errors, has been served upon him. *Christian* v. *Commonwealth*, 334.

Notices of New Books.

A Treatise on the Law of Contracts not under Seal. By William W. Story, Counsellor at Law. Boston: Charles C. Little and James Brown. 1844. pp. 472.

The elementary treatises and text books of English law do not, as a general rule, rank very high as works of art. They are full of learning and are of much practical value to the profession, but they want symmetry, finish, just disposition of parts, logical sequence and luminous arrangement. The classical elegance of Mr. Justice Blackstone's great work is as yet unapproached by any of his countrymen, though Mr. Serjeant Stephen's beautiful Treatise on Pleading makes us pause ere we record this sentence. On one occasion, it is said, the various representatives of the European powers at Constantinople agreed to dine together, and each to contribute his national dish to the entertainment. The contribution of the English ambassador was, of course, a plum-pudding, the ingredients of which were carefully supplied to the cook. At the proper period in the dinner the English ambassador's dish was announced, and two stout servants were seen to enter the room groaning under the weight of a vast tureen, filled with a liquid substance. The mystery was soon explained. The ambassador had forgotten the bag, and his dish appeared in the form of a plum broth and not of a plum pudding. The law writers of England are, in like manner, apt to forget the bag. The essential principles of the subject they discuss are to be found floating "rari nantes in gurgite vasto" over a wide surface of particular cases, spread out upon the page, to the advantage of the practitioner, but to the confusion of the student. One great reason of this peculiarity is to be found in the fact that many of the most approved English law books have been written by men who were exclusively lawyers; whose minds had not been enriched by elegant studies or polished by habitual intercourse with an intelligent and cultivated society. Another cause is the intensely practical character of the English mind, and its indifference to all inquiries which do not lead directly or indirectly, to some substantial benefit.

The work before us by Mr. Story is not liable to objections of this class. The constructive skill of a true artist is visible in its design and proportions. It is the production of a writer who was a scholar, before he was a lawyer, and whose familiarity with models of excellence in literature would not permit him to rest satisfied without shaping his materials into approved forms. The design and purpose of the work are thus explained in the preface.

"The present work is intended, primarily, as a text-book for students, but it is by no means restricted in its scope or design to such a use. Its purpose is not only to sketch an elementary outline of the law relating to simple contracts, but to elucidate and systematize, as far as practicable, the general law applicable to the subject; in the hope that it may serve alike the student and the practitioner. It is believed, that such a work is now needed by the profession, for new circumstances and exigences so modify and expand every department of jurisprudence, as to require new expositions of the law, however valuable preceding treatises may have been. The plan of the present work has been to render cases subordinate to

principles, and, instead of pursuing the common method of merely digesting the various authorities, to throw the main body of them into the notes, and to incorporate those only in the text, which seemed to afford the best illustrations of the doctrine under consideration."

The work is divided into three parts. The first part, on contracts in general, is comprised in eight chapters, in which are discussed the subjects of the different kinds of contracts, of the parties to a contract, of the mutual assent of the parties, of the consideration, of illegal contracts, of contracts in violation of a statute, of the construction of contracts and of the admissibility of parol evidence to affect written agreements, The second part, which treats of particular contracts, is subdivided into six chapters, which treat of agency, partnership, bailments, sale of personal property, guaranty and landlord and tenant. The third part, contained in three chapters, treats of defences, penalties and liquidated damages, and interest.

The above outline has been faithfully and laboriously filled up. All the cases bearing upon the subject appear to have been diligently studied, and the results are stated with great clearness and precision, and with commendable brevity. The moderate size of the book is one of its principal merits. Mr. Story, as a matter of conscience, has discarded from the text everything which is not essential to the elucidation of the legal principle. The authorities are referred to in the notes, but the facts of the several cases are sparingly introduced and stated with great brevity. The style of the work is entitled to high praise. It is terse, clear and compact; neither careless nor diffuse, and with that scholarlike finish which shows an acquaintance with the best models of English composition. Its compactness is sometimes carried almost to a fault. Some of his discussions would be more profitable to the student if more diffusely expanded. The food of the mind, like that of the body, should not be too finely bolted, and a little admixture of chaff helps digestion in both cases. But this is "an amiable weakness," and we will not complain of it in these days.

Another merit of the work is the careful accuracy of its statements and definitions. There are no marks of haste, carelessness and legal book making. Legal distinctions and principles are stated with much precision, and show that power of dividing and discriminating which is so large an ingredient in the composition of a good lawyer. It is easy to perceive that no sentence has been written without having first been carefully considered and deliberately weighed.

We are glad to see that Mr. Story does not dodge the expression of his own opinion on controverted points, but gives it, neither timidly nor arrogantly. We quote, as an instance of it, a note on the vexed question of the meaning of the word "agreement" in the Statute of Frauds. We entirely agree with Mr. Story in his views on this point. Nothing but a blind and bigoted deference to authority could ever have given the case of Wain *v.* Warlters such binding force.

"This construction was unknown until the case of Wain *v.* Warlters, 5 East R. 10, in which Lord Ellenborough first established the rule. The term agreement had, before then, been construed according to its popular signification; but, in view of the known accuracy of Sir Matthew Hale, who was supposed to have drawn the statute, he concluded, that the legal signification of the term must have been intended; and, that it, therefore, included both promise and consideration. Since this case, the doctrine, though questioned in Egerton *v.* Mathews, 6 East, 307, has been recognized and supported by all subsequent authority. See Jenkins *v.* Reynolds, 3 Brod. & Bing. 14; S. C. 6 Moore, 86; Stadt *v.* Lill, 9 East, 348; Lyon *v.* Lamb, cited in Fell on Guaranties, Appendix, No. 3; Morley *v.* Boothby. 3 Bing. 107. The rule has not, however, met with thorough approbation in England, and has been looked upon as of doubtful policy and propriety. Lord Eldon said, in ex parte Gardom, 15 Ves. 286, "Until that case [Wain *v.* Warlters] was decided, some time ago, I had always taken the law to be clear; that, if a man agreed in writing, to pay the debt of another, it was not necessary, that the consideration should appear on the face of the writing." See also, Morris *v.* Stacey, Holt N. P. C. 153; Theobold on Princip. and Surety, 10, note *b*; Newbury *v.* Armstrong, Mood. & Malk. 391. It appears, also, by the case of Ash *v.* Abdy, 3 Swanst. 664, that the statute of frauds, so far from having been drawn by Lord Hale, was a mere piece of patchwork. It was originally introduced into the House of Lords, by Lord Nottingham, and was there altered by both judges and civilians, and thus arrived at its present form. Lord Ellenborough's reason-

ing is, therefore, founded upon an incorrect supposition; and the actual history of the statute shows, pretty conclusively, that it was either an oversight, or that the term "agreement," was used in its ordinary and popular sense. Lord Ellenborough, himself, decided in Egerton *v.* Mathews, 6 East, 307, that a contract for the sale of goods was valid, although it expressed no consideration on the face of it; and this was decided in the face of the 17th section of the statute, requiring a memorandum of every "bargain," for the sale of goods. Surely, the same reasoning, which he employs to prove that "agreement" means mutual assent, applies with double force to the term "bargain." As to the policy of the construction, as given by Lord Ellenborough, all that need be said, is, that it, in fact, nullifies four out of five, of all the *bonâ fide* guaranties, given in the course of commercial transactions, and annihilates security given and received in good faith, without conferring any corresponding benefit. The object of the statute, evidently, was, to secure evidence of the promise, rather than of the consideration, which may easily be proved in most cases, and, which is, *primâ facie*, proved by the fact of the promise itself."

See also the note on page 11, for a temperate and able examination of the opinion of the supreme court of Massachusetts in Clark *v.* Baker, 5 Metcalf, 452.

In conclusion, we commend the book to the profession as one of sterling merit, both of matter and manner. The student will find in it good law expounded in a style of uncommon clearness and beauty. It is a book which would do honor to any one, and it reflects the highest credit upon so young a lawyer as Mr. Story. It gives us the assurance of distinguished professional success hereafter; but should this work comprise all the legal fruits of his life, he will have paid most liberally the debt which he owes his profession.

This work, written by a son of Mr. Justice Story, whose judicial labors and legal writings have done so much for the advancement of the science of jurisprudence at home, and so much for the honor of American law abroad, suggests, by a natural principle of association, the previous instances on record, of a transmission of legal ability from father to son. The father of Sir Thomas More was one of the justices of the court of king's bench, a rank, which was then as it is now, *primâ facie* evidence that its possessor was a good lawyer. The father of Lord Bacon was Lord Keeper for more than twenty years, and he held the great seal with purer hands than his immortal son. At a later period, Charles Yorke, the second son of Lord Hardwicke, was a most accomplished lawyer and scholar, the leader of the bar, who died just as his grasp had closed upon the great seal and a peerage. In our own times the works of Sir John Bayley on Bills, and of Lord Tenterden on Shipping, have, each, been edited by the sons of their respective authors. Two of the sons of the late Mr. Chitty, that unwearied author, who wrote more books than many lawyers have read, are respectable legal writers; and the father, in his prefaces to some of his latest works, acknowledges with just pride, the assistance which he had derived from them. A son of the late Lord Erskine is now one of the judges of the court of common pleas in England. In our own country, the learned and excellent Chancellor Kent, "clarum et venerabile nomen" has had the rare happiness of living to see his son occupying a judicial station, with learning and ability not inferior to his own. Life can have no higher or purer pleasure than that which a father must feel in seeing his son winning laurels in those fields in which his own were gathered, and walking in his own footsteps along that path which has led him to honor and success.

A Treatise on the Medical Jurisprudence of Insanity. By I. Ray, M. D., Superintendent of the Maine Insane Hospital. Second edition, with additions. Boston: William D. Ticknor & Company, 1844.

Among all the changes and improvements, which have taken place within the last half century, none have been greater or more important, than those which have been introduced into the treatment of mental disease. Pinel, justly called the Howard of the insane, began the work, towards the close of the last century, by knocking off the chains and fetters of the maniac, and, at once, by kindness and humanity, transforming the madhouse into an asylum. Spurzheim, in the beginning of the present century, and Combe, at a somewhat later period, gave to the sub-

ject of mental disease the character of a science, and laid the foundation, in a great degree, of the remedial treatment which is now so successfully applied. Following in the footsteps of these illustrious benefactors of their race, the author of the present work has made the first attempt to apply the science of Spurzheim, and the humanity of Pinel, to the determination of the legal relations and responsibilities of the insane.

To appreciate justly the merit of this attempt, as well as the great difficulties in the way of its successful accomplishment, one should have made, as Dr. Ray has done, a profound study of the principles and maxims of our jurisprudence relating to the subject of insanity. The following paragraph from the work before us will serve to give some idea of the nature of the author's undertaking.

"In all civilized communities, ancient or modern, insanity has been regarded as exempting from the punishment of crime, and under some circumstances at least, as vitiating the civil acts of those who are affected with it. The only difficulty, or diversity of opinion, consists in determining who are really insane, in the meaning of the law, which has been content with merely laying down some general principles, and leaving their application to the discretion of the judicial authorities. Inasmuch as the greatest possible variety is presented by the mental phenomena in a state of health, it is obvious, that profound study and extensive observation of the moral and intellectual nature of man can alone prevent us, from sometimes confounding them with the effects of disease. It would seem, therefore, an almost self-evident proposition, that a certain knowledge of the mind in its healthy state is an essential preliminary, to the attainment of correct ideas concerning its diseased manifestations. If, in addition to this, it is considered, that opinions on the nature of insanity, viewed solely in the light of a disease — of a derangement of the physical structure, — have been constantly changing for the better, it follows of course, that its legal relations, which should be determined in some measure by our views of its nature, ought to be modified by the progress of our knowledge. That much of the jurisprudence of insanity, in times past, should bear marks of the crude and imperfect notions, that have been entertained of its pathological character, is not to be wondered at; but, it is a matter of surprise, that it should be adhered to, as if consecrated by age, long after it has ceased to be supported by the results of more extensive and better conducted inquiries. It is to be feared, that the principles, laid down on this subject by legal authorities, have been viewed with too much of that reverence, which is naturally felt for the opinions and practices of our ancestors; and that innovations have been too much regarded, rather as the offspring of new-fangled theories, than of the steady advancement of medical science. In their zeal to uphold the wisdom of the past, from the fancied desecrations of reformers and theorists, the ministers of the law seem to have forgotten, that, in respect to this subject, the real dignity and respectability of their profession is better upheld, by yielding to the improvements of the times and thankfully receiving the truth, from whatever quarter it may come, than by turning away with blind obstinacy, from everything that conflicts with long-established maxims and decisions. In the course of the review proposed to be taken of the principles, that have regulated the civil and criminal responsibilities of the insane, the reader will have constant opportunity to witness the influence of the spirit above condemned; and be inclined, perhaps, to consider it as the source of that striking difference, presented by the sciences of law and medicine, in the amount of knowledge they respectively evince on the subject of insanity."

Between the person of sound mind, and the raving maniac, concerning whose legal rights, responsibilities and relations, no one ever entertains the slightest doubt, there are degrees without number of insanity, the subjects of which are legally responsible, to a certain extent, and in certain respects, but not to the same extent nor in the same respects as persons of sound mind. These last are the cases, to the solution of which Dr. Ray has devoted himself, and, as we think, with a great degree of success.

Intelligence and Miscellany.

ANONYMOUS WRITING — "I" *v.* "WE."

In the Western Law Journal, for November last, there occurred the following remark upon an article in the Law Reporter: "*I* wish the editor would adopt the rule *I* have adopted, of publishing nothing anonymously; and then *we* should know to whom to give the praise of this high-toned and well-reasoned defence of the independence of the judiciary." Entertaining a high regard for the source of this significant "wish," we were still of the opinion, that our own course was the most proper for us; and, in a recent number, when speaking of the Western Law Journal, we took the liberty of remarking upon two idiosyncrasies in matters of form in the conduct of that journal, one of which is the rule of publishing nothing anonymously, and the other, the adoption by the editor of the first person singular in his own articles. To this our contemporary makes a reply in his last number, which seems to require some notice from us. We do not consider the subject of sufficient importance to occupy much space, relating chiefly to a matter of taste, concerning which there should be no dispute. But as the discussion did not originate with us, we may be pardoned for indulging in a few remarks upon a point not entirely personal to ourselves.

The names of writers are affixed to the articles which appear in the Western Law Journal. With the Law Reporter a different course is adopted, although the names of writers are often made known to those who take the trouble to inquire at the proper source. But, in general, we prefer that every article shall pass for what it is worth in itself considered. If it is sound and well-reasoned, nothing more is needed; if it is not, the name of the writer ought not to give it any factitious reputation. It is of little consequence who writes, if the contributions are good. In one sense the writer for a periodical is nobody; his article, everything. And although we naturally expect able communications from able men, yet every editor is aware that men, comparatively unknown, sometimes furnish the best articles.

In regard to reports of cases in law journals, the profession must rely upon the editor, who is presumed to publish nothing in this shape for which he has not good authority; and there is really much more safety in this course than in the one proposed, because if the editor feels this responsibility, he will naturally act with great caution in this regard. But what additional weight of authority is given to a report by the name of some person as reporter, who has never been heard of beyond the limits of his own state?

Many of the cases in the Law Reporter are reported by the editor, and the abstracts of nearly all are prepared by him; but cases are often furnished by gentlemen of high respectability and eminence in the states where they reside. They are known to us; we rely upon them, but yet their names would be no sort of guaranty to nine-tenths of our readers. It is the disadvantage of the profession in this country, that a high reputation at the bar is circumscribed within narrow limits. How few mere lawyers have a national reputation! How few of the eminent lawyers

in Massachusetts (we mean those who have spent their lives at the bar and have never entered into politics) are known in the West! And what satisfaction would it be to our subscribers in Ohio, for us to state, that a particular case was reported by a member of the Massachusetts or Maine bar! Indeed, it would be ludicrous to parade, in a law journal, the names of persons, not one of whom had any reputation out of his own county or state. The editor of the Western Law Journal cites what he seems to suppose our own example against us, and gravely alludes to an *advertisement* on the cover of this journal!

He speaks of the "anonymous shield" as the prime cause of the alarming prostitution of the periodical press. But if an editor is disposed to prostitute his pages, we do not see how the matter will be helped by compelling every nobody to put his name to his scurrility. Moreover, where the editor holds himself personally responsible to the public, he will be much less likely to admit matter of a doubtful character. The editor of the Western Law Journal wishes equal and exact justice done to all contributors. "If they deserve praise," he says, "they have it. If they deserve censure, they have it. The editor does not rob them of the one, nor shield them from the other. All know where the responsibility rests, and form their judgments, and govern their actions accordingly. Whereas, in nine cases out of ten, the real motive of writing anonymously, is the craven one of avoiding responsibility. I may be told, that in such cases, the editor takes the responsibility on his own shoulders. But this is precisely what I will not do." The editor of the Law Reporter has no disposition to assume responsibility unnecessarily, nor is he disposed to shrink from any that may fairly belong to him, but he would prefer to take all the blame without any of the praise of the articles in that journal, rather than to stand in it simply as a contributor — the collector of other men's thoughts.

In regard to the use of the first person singular, "I," rather than the first person plural, "we," the editor of the Law Journal is still more emphatic. But he admits, that it is nothing more than a question of taste; as such we are content to leave it. "And now," he says, "let me ask Mr. Chandler, in all candor, whether, when he first used his favorite plural, though speaking only for himself, he did not feel it to be a ridiculous piece of affectation?" In answer, we beg leave to say, that we thought nothing about it. Our anxiety was more as to the justice and propriety of what we were saying, than the manner in which it was said. In undertaking editorial labors and responsibilities, we were content to adopt that phraseology which was universal. It did not occur to us, that it was our duty to attempt a reformation in a mere matter of taste, which had been settled by wiser men than will ever sit in the editorial chair of the Law Reporter. "But herein," as Lord Coke might say, "lyeth much meaning." The editor of the Western Law Journal is a reformer — a most able and indefatigable one — but still a reformer. For many years he has been known as such, and has maintained his positions with no inconsiderable ingenuity and strength. If he has failed to convince us on some of the weightier matters of the law, it can hardly surprise him, that we should differ upon a matter of taste like the one under consideration. We perceive that one of his objects in the Law Journal is to advocate a legal reform. We have no such object. We aspire to no such position. Our main desire is and has been to furnish a practical journal of the law as it is. We trouble ourselves but little, perhaps too little, upon theories as to what it should be. It may be very proper for our contemporary to stand for principle in all things — to dispute the editorial "we," and make a thorough reform in the "ultimates" of the craft. *Homo ad unguem factus* is his motto. But for us, a humbler course will suffice. We look to precedent. We feel bound by it in matters of law, we submit to it in matters of taste; and we need not remind our contemporary, that there is a difference between the reform of abuses and the *affectation of singularity*. A gentleman of the old school, who rails at modern fashions, and wears his small-clothes and cocked hat, can scarcely convince sensible people that he is not a vainer man, than he who quietly conforms to the fashions, and suffers his tailor, unobstructed, to

make his nether garments in the prevailing mode. Need we add, that the editorial "we," and the anonymous article, *may* cover more true modesty than the oracular "I," and the constant statement, in small capitals at the head of articles, of the names of writers who (it is no discredit to them to say) have scarcely attained a national reputation.

It is somewhere said, that pride often stalks in filthy rags, while meek humility sits clothed in purple robes. It is certain, that the path of sober usefulness

> Winds round the cornfield and the hill of vines,

honoring the customs, and, it may be, the prejudices of the world; while that of sturdy principle (often a name for wild reform) makes straight for mountain tops, losing itself in airy regions, where the feet of sober men can scarcely tread.

Singular Divorce Case. — In the case of Margaret E. Robertson, called Margaret E. Cowdrey, petitioner for divorce, *v.* Edward M. Cowdrey, which recently came before Vice Chancellor McCoun, the following facts appeared as reported in the New York Evening Post: — The complainant is daughter of Mr. David H. Robertson, merchant, of New York, about sixteen years of age, and the defendant, a young man in respectable standing, twenty-three years of age. He frequently visited her at the house of her father on the Second Avenue, and they became attached to each other. Her parents, it is said, (with a view of withdrawing their daughter from the attentions of the defendant,) were about sending her on a visit to some relatives in New Bedford, thence to see some friends in the island of Cuba. The defendant, being passionately attached to her, and dreading that her absence might lose her to him, prevailed upon her one forenoon to accompany him to the residence of Rev. Mr. Hutton, a presbyterian minister, and be married; the understanding between them being that the marriage was not to be considered legal, or binding, but merely to render their engagement to each other still stronger than it was. They were so married, — a younger brother of Mr. Cowdrey, and a friend of Mr. C. named Wilcox, only being present. The defendant met her in the street on the morning of the ceremony, nearly opposite Niblo's, and they went to Mr. Hutton's in a carriage. While going, it is stated, they agreed that the ceremony should be a mere form, and that they were not to consider themselves man and wife for two years, and not then, till their parents' consent had been obtained, and the marriage ceremony had been performed over.

On leaving the house of the minister, the complainant went home to her father's house. The marriage never was consummated. The complainant, a day or two afterwards, insisted that her friends should be informed of their imprudence, which was done. Finally, opposition sprung up, and the defendant claimed that she was his bride, and bound to him by the solemn ties of wedlock. She opposed the idea, and in excuse for the precipitate course she had pursued, declared that he was the first man who had ever addressed her in the language of love, and she thought she could confide in what he said, that the ceremony was not to be legal or binding. This was in March, 1843, Miss R. at the time being but fifteen and a half years of age, though womanly in appearance. Divorce was applied for, and it is said her affection has turned to the reverse.

Considerable testimony was adduced. Mr. and Mrs. Robertson stated that Mr. Cowdrey had called at their house in a social and familiar way, but they knew nothing of the proposed marriage, nor was it done with their knowledge or consent. Augustus L. Cowdrey testified that he was present at the wedding. "At the time of the ceremony, I don't think that either of them made any answer. After we went out, I told Margaret I did not think the ceremony was binding, because they did not make any answer. She replied, that she was so full of laughing, I thought the expression was, that she did not know what she was about. The defendant made no claim that he was married at the time."

The master in chancery reported in favor of a dissolution of the marriage. Ordered that a divorce, accordingly, be granted. Divorce granted.

Hotch-Pot.

It seemeth that this word Hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 178 a.

Hon. John Pickering, the city solicitor of Boston, has prepared for the press a new edition of his Greek and English Lexicon. Mr. Pickering is a living instance, that professional and literary eminence are not inconsistent. He is undoubtedly one of the most learned philologists living; and the variety, extent, and depth of his legal acquirements, especially in the civil law, are known to all who are familiar with the Massachusetts Reports. We have heard it said, that he received ten thousand dollars from the first edition of his Lexicon — a larger sum, probably, than was ever received for the same amount of professional services by any one of those "practical men," who make themselves hoarse in denouncing the least connection between law and literature. Some men, after the professional labors of the day, take their relaxation in idleness; others employ a few hours in attention to literature and the polite arts. We never could understand why the latter may not be as learned, accurate, and able lawyers as the former.

In case of the annexation of Texas, what effect is to be given to that provision in the constitution relating to *fugitives from justice?* In mercy to that large class of enterprising men, who have "gone to Texas" in a hurry, during the last ten years, it would seem (in accordance with the spirit of the whole proceedings in the premises,) that some clause should have been inserted in the treaty, for their protection; otherwise a considerable portion of the newly-acquired territory might have been depopulated, as soon as the broad shield of the constitution was extended over it. If the various states, after annexation, may make requisitions upon the "Governor of Texas" for all who have fled from justice, there might be great astonishment and alarm throughout a country for which our government has expressed so much sympathy. We are not sure that a grand indignation meeting would not be called, extending from the Sabine to the Rio del Norte.

In the supreme judicial court, at Boston, recently, on habeas corpus, a boy answering either to the name of "John" or "George," was set at liberty by Chief Justice Shaw. The facts were briefly these: He was put by his owner on board the brig Carib, Capt. Porterfield, master, at New Orleans, bound for Trinidad de Cuba. The captain was not allowed to land him by the authorities of that port, and having freight for Boston, he came here with his brig with the boy on board. The boy was therefore held not to be a fugitive slave, being brought here by the voluntary act of his master's agent. The fact that he was on board became known to some members of the abolition party, and they got out a writ of habeas corpus. The boy has a mother and father in New Orleans, but he preferred to remain in Boston to returning to his owner.

We have just seen the New York Legal Observer, for May 1, 1844, nearly five pages of which are occupied by quite a sharp review (apparently original with that journal) of our criticism on the twenty-first volume of the Maine Reports. To this the editor makes the following note: "We readily give insertion to this communication. As the matter is in very able hands, it would be idle on our part to offer any comment." All this is sufficiently amusing to us, who saw this identical article in the Thomaston (Maine) Recorder, from which it was copied into other Maine papers, *some time before it appeared in the New York Legal Observer.* One of these papers, of the date of April 26, 1844, is now before us.

In Massachusetts the following appointments have been made to the bench of the common pleas, namely, Daniel Wells, Esq., of Greenfield, chief justice; Emory Washburn, Esq., of Worcester, and Joshua H. Ward, Esq., of Salem, justices. Mr. Forbes, of Northampton, was appointed chief justice in the first instance, but declined. Chief justice Williams has resumed the practice of the law in Boston. We understand that judge Warren has entered into a business arrangement with Messrs. Rand & Fiske, of Boston. Judge Cummins, we believe, retires altogether.

Charles Gilman, Esq., of Quincy, Ill., has in press a digest of the decisions of the supreme courts of Indiana and Illinois, and the circuit court of the United States for the seventh circuit. It will embrace four volumes of Blackford's (Indiana) Reports — one of Breese's — three of Scammon's (Illinois), and two of McLean's (U. S. C. C.) Mr. Gilman is a sound lawyer, and a gentleman of great accuracy. We do not doubt that his volume will prove useful to the profession, and highly creditable to himself.

A man named Abraham Smith, was taken by force from jail, at Frederickstown, Missouri, on the 5th ult. and hung by the mob. He had been sentenced to death in June last, but his execution had been stayed until September next. Four of the mob had been arrested, and committed to take their trial for murder. Will they be convicted?

We understand that Mr. Justice Story is preparing for the press a new edition of his Equity Pleadings. He is also engaged upon his work on Promissory Notes.

William W. Story, Esq., the reporter of the United States Circuit Court for the first circuit, is preparing the second volume of his reports for the press.

Among the recent subscribers to the Law Reporter, are two from *New Diggings*, Iowa.